Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

DILLING MECHANICAL CONTRACTORS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 668, AFL-CIO and INDIANA STATE PIPE TRADES ASSOCIATION, UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, AFL-CIO,

Intervening Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a construction contractor, Dilling Mechanical Contractors, Inc., required to prove beyond a reasonable doubt that it unconditionally offered reinstatement to unfair labor practice strikers contrary to the requirements of 29 U.S.C. § 160(e).

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PETITION FOR WRIT OF CERTIORARI

Dilling Mechanical Contractors, Inc. respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 21, 1997 to resolve the conflict between the Seventh Circuit Court of Appeals decision and 29 U.S.C. § 160(e) on the issue of burden of proof as set forth below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 107 F.3d 521 and was decided on February 21, 1997 with the Petition for Rehearing denied April 4, 1997. It is reprinted in Appendix "A", pgs. 1 through 8.

JURISDICTION

On February 21, 1997, the United States Court of Appeals for the Seventh Circuit denied Dilling's appeal of the National Labor Relations Board's September 18, 1995 Decision in which it adopted the Administrative Law Judge's recommended Order in this matter.

Dilling's subsequent Petition for Rehearing which it had filed on March 7, 1997, was denied by the Seventh Circuit on April 4, 1997.

Dilling is now seeking review on certiorari pursuant to United States Supreme Court Rule 10, contending that the 7th Circuit of the United States Court of Appeals has

rendered a decision in conflict with its prior decision in *NLRB v. Augusta Bakery Corp.* (1992), 7th Cir., 957 F.2d 1467, and the requirements of 29 U.S.C. § 160(e).

Pursuant to the United States Supreme Court Rule 13, "unless otherwise provided by law, a Petition for Writ of Certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States Court of Appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the clerk of this Court within 90 days after entry of the judgment."

The United States Supreme Court Rules 10 & 13 in conjunction with Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* confers on this Court's jurisdiction to review the Seventh Circuit's Order in this matter.

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1. 29 U.S.C. § 160(e).

> (e) Petition to court for enforcement of order; proceedings; review of judgment
>
> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary

relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

> recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

STATEMENT OF THE CASE

Dilling is a construction contractor that was performing work on the Essex Wire Facility located in Franklin, Indiana more than fifty miles from Dilling's corporate office in Logansport, Indiana. Dilling had several employees performing electrical work on the Project, and these employees were supervised by Project Superintendent, Joel LaFleur, and an Assistant Superintendent, Roger Seely. The Essex Project began in late 1992 and finished in the summer of 1993. During the course of the Project, beginning in December 1992, the International Brotherhood of Electrical Workers ("IBEW") attempted to organize Dilling. In doing so, IBEW recruited some of Dilling's employees performing electrical work on the Project. In April 1993, some of the employees recruited objected to the manner and method that Dilling supervised them, and five of them initiated what they claimed to be an unfair labor practice strike, and a sixth, the Project Superintendent, Joel LaFleur, quit. (Record, pgs. 52 and 792).

The five employees, Robert Guinn, Gene Kaufman, Donna Serna, Michael Boatman, Sr., and Michael Boatman, Jr. initiated their strike on August 12, 1993. During the course of their strike the five employees carried picket signs and walked a picket line outside the Essex Wire facility. After engaging in their strike for eight days, on April 20, 1993, Bob Guinn, on behalf of the five striking employees informed the new Project Superintendent, Glen Click, and the Assistant Superintendent, Roger Seely, that he was wondering "if we were allowed to return to work." (Record, Page 266). He further stated, "we was ready to come back to work if you would take us back to work." (Record, Page 54). The Project Superintendent, Click, told Guinn and the strikers that they "needed to talk to Mr. Dilling" (Record, pgs. 54, 266, 422, 721) and that Mr. Dilling would give them "an assignment". (Record, Page 422). The five strikers did not report to work, did not contact Mr. Dilling, and did not seek or receive an assignment for work with Dilling. (Record, pgs. 266, 421, 422).

The striking employees were required to report back to Mr. Dilling, the president of Dilling Mechanical Contractors, Inc., because he was the sole person responsible for hiring, firing, and assigning work for employees. (Record, pgs. 762, 802-803). At the time that the five strikers discussed their status with Glen Click, at the Essex Project, Glen Click informed them that he did not have work available for them at the Essex facility because Dilling had engaged a subcontractor to perform the remaining electrical work. (Record, pgs. 662-663).

After being informed of the need to report to Mr. Dilling for an assignment, the five employees returned to

their picket line, began carrying picket signs, and continued to walk the picket line in front of the Essex facility from early in the morning on April 20, 1993 and for several months thereafter. (Record, pgs. 266, 399). The five strikers never reported to work at Dilling and never contacted Mr. Dilling for a work assignment. (Record, pgs. 808-809).

The strikers subsequently filed unfair labor practice charges against Dilling and the proceeding before the National Labor Relations Board was initiated. The Administrative Law Judge ruled in favor of the striking employees, ordering reinstatement. This decision was adopted in its entirety by the full Board. Subsequently, Dilling Mechanical Contractors, Inc. appealed this decision to the seventh Circuit Court of Appeals which affirmed the Board's decision. Dilling's Petition for Rehearing was denied, and this Petition ensued.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit Court of Appeals violates the standard of proof required under 29 U.S.C. § 160(e).

An employer is only required to prove its offer of reinstatement to striking employees based upon substantial evidence. This threshold is greater than a mere preponderance of the evidence, but is less than proving beyond a reasonable doubt. As importantly, the Court must apply the same standard to the employer's burden of proving its offer of reinstatement as it does to the employees' burden of proving their unconditional offer of

returning to work. In this case the same burden of proof was not applied equally to both parties.

In this case, the employer was required to prove its offer of reinstatement beyond a reasonable doubt, contrary to the dictates of statute and precedent. *NLRB v. Augusta Bakery Corp.* (7th Cir. 1992),957 F.2d 1467; 29 U.S.C. § 160(e).

The Seventh Circuit Court of Appeals in its initial Opinion rendered in this case reviewed both the employees' unconditional offer to return to work and the employer's offer of reinstatement. In reviewing the unconditional offer to return to work the Court concluded that the striking employees proved by substantial evidence that they did indeed make an unconditional offer to return to work. In doing so, the Court established parameters for proof based upon substantial evidence. The Court concluded that the burden of proving the offer to return to work by substantial evidence was carried when the strikers made a vague offer to return to work, issued letters in apparent conflict with their actions, and acted contrary to their expressed intent of offering to return to work unconditionally.

In particular, the offer to return to work was stated as an inquiry by Mr. Guinn wondering if "we were allowed to return to work" and that they were "ready to come back to work [if Dilling] would take them back to work." (Record, p. 54). The strikers then went back on the picket line and did not report to the office for an assignment of work. Clearly an action contrary to the expressed intent of offering to return to work unconditionally. Subsequently, the strikers then sent a letter to Dilling indicating

that they had returned to work, even though they had not, and requesting the employer to contact not Guinn, the spokesman who offered to return to work initially, but a third party, Ed Butler, who was not an employee at all.

Nonetheless, both the Board and the Seventh Circuit Court of Appeals concluded that the evidence constituted substantial evidence to support the employees' burden of proof. Not only was it sufficient to prove their case, it was sufficient to insulate their evidence from collateral attack by the employer. The Court concluded that "there is substantial evidence to support the Board's conclusion that Guinn's statement to supervisor, Click, at the Essex Wire Jobsite – that they were 'ready to come back to work' – was sufficient to notify Dilling that the strikers were making an unconditional offer to return to work. Substantial evidence also exists to support the Board's finding that the April 20, 1993 fax sent to Dilling served as further notice that the strikers sought a return to work unconditionally." (Opinion, pgs. 6 and 7). By so stating, the Seventh Circuit Court of Appeals established the standard to be used to determine whether or not substantial evidence has been presented to the Board or to the Court.

Based upon the Court's standard of substantial evidence needed to carry a party's burden of proof, Dilling also proved by substantial evidence that it offered reinstatement to the striking employees. It is undisputed that the striking employees were offered reinstatement. The striking employees were told by Glen Click to report to Dick Dilling, the owner of the company, for a work

assignment. (Record, pgs. 54, 266, 422, 721). This statement, made to the striking employees at the same time that they made their offer to return to work, was not misunderstood. Donna Serna, one of the strikers, confirmed that the strikers were "given the instruction down at the Essex project that you were to set up an appointment with Dick if you wanted your job back" and Serna took no action on that, even though (she) was right outside the office. (Record, p. 422).

Using the same standard of what constitutes substantial evidence, and applying it to the facts in support of Dilling's proof, it reveals that Dilling made an offer, no less ambiguous or disjointed than the offer to return to work made by Guinn on behalf of the employees. This offer was not misunderstood by the strikers, but in fact was fully understood, as confirmed by Serna's testimony. The strikers fully understood that Dilling had offered them reinstatement in the same manner that the strikers had offered to return to work. Neither the strikers nor the employer used all of the technically correct words in their statements, but the recipients of the statements fully understood the extent and meaning of the statements made.

Similarly, Dilling, after making the offer of reinstatement acted consistent with the timely offer of reinstatement. That is, the owner of the company made himself available, all day, to talk to the returning strikers and assign them to work. Such an action was consistent with the offer to return to work, unlike the strikers who acted inconsistently with their offer by returning to the picket line. Nonetheless, the strikers were deemed to have carried their burden of proof through substantial evidence.

Although both the Board and the Court place some emphasis on correspondence which occurred after the time of the offers made between the parties, such evidence merely confirms each party's understanding of their actions. For example, the union's letters sent almost four months after their offer to return to work, merely confirmed that they had made such an offer. Similarly, the employer's response to that letter merely confirmed that the employer had offered them reinstatement and they had refused. The weight of either letter should be minimal, since it is each party's understanding at the time that the offers were made which should govern a decision in this case.

Dilling established through substantial evidence, as substantial evidence was defined by this Court, in this case, that it made an offer to reinstate the employees, that that offer was fully understood by the employees, and that the employees failed to avail themselves of the opportunity presented in that offer, and thereby rejected the offer of reinstatement. Dilling carried its burden of proof through the testimony of both strikers and Dilling employees who testified to the exact words that were spoken and, more importantly, to how those words were understood by all parties involved. It is imperative that the actual understanding of the parties involved be used by this Court and not the possible understandings of the parties.

If Dilling were to prove that it was more likely than not that it offered to return the strikers to work, then such a proof would be proof by a mere preponderance of the

evidence. If Dilling were to prove that it offered reinstatement through a bundle of evidence which clearly outweighs any evidence to the contrary, then Dilling has established its proof by substantial evidence. If, however, Dilling is required to carry its burden of proof by establishing that all possible facts and inferences can only be drawn in its favor and in support of its offer of reinstatement, then Dilling will have been required to prove its case beyond a reasonable doubt. By the Seventh Circuit Court of Appeals applying a different standard of proving Dilling's offer of reinstatement than it does to the union's offer to return to work, the Court necessarily forces Dilling to carry a burden greater than the striking employees are required to carry, and necessarily requires Dilling to prove its case beyond a reasonable doubt.

This higher standard of proof is evidenced by the conclusions drawn by the Court, and the comparison made by the Court between the offers of the two parties. The Seventh Circuit Court of Appeals concluded that a vague statement made by Bob Guinn wondering if they were able to come back to work and wondering about their status constituted an unconditional offer to return to work, while concluding that a vague statement, as determined by the Court, that the striking employees were "to set up an appointment with Dick Dilling if they wanted their job back", despite the strikers' full understanding of what that meant, did not constitute an offer of reinstatement. The Court is employing an arbitrary double standard for proof.

Similarly, the Seventh Circuit Court of Appeals emphasized what inferences could be drawn from the parties' actions, and how the parties acted after the offers

were made to determine their validity. Again, the Court concluded that the union's actions of returning to the picket line was consistent with their offer to return to work, while Dilling's actions of making the owner available to meet with the "returning" strikers was inconsistent with an offer of reinstatement. The union's actions contrary to its offer are dismissed as permissible actions on behalf of the union. The actions by Dilling are merely deemed incredulous, despite his statements being unrefuted and undisputed by anyone.

Finally, the Seventh Circuit Court of Appeals infers that the union acted properly based upon correspondence they sent to the employer almost four months after their return to work. Correspondence which clearly sets forth that they had intended to make an unconditional offer at that time. The Court then infers that Dilling did not intend to offer reinstatement to its employees based upon the employer's response to the union's letter which states clearly that the employer had offered them reinstatement and the employees had rejected it. The language in the two subsequent letters was clear and not subject to misinterpretation. Nonetheless, the Court interprets the union's letter consistent with the plain and ordinary meaning of the words contained within the letter, but rejects the employer's clear and unambiguous language as being secondary or unintended.

These three comparisons demonstrate that the Court is not requiring the employer to establish its proof pursuant to the same standard that the striking employees were required to establish their proof, but that the employer has a greater burden. A burden of establishing that there can be no facts, no inferences, no reasonable

doubt as to contrary conclusions which can be drawn from their evidence. Consequently, the employer is being required to prove its case beyond a reasonable doubt contrary to both the dictates of statute and precedent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL L. EINTERZ, #11717-49

APPENDIX

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Appeal to the United States Court of Appeals for the 7th Circuit denied; NLRB Decision enforced 107 F.3d 521 7th Cir. 1997; rehearing denied April 4, 1997 ..... App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-3407 and 95-3641

DILLING MECHANICAL CONTRACTORS, INC.,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board.
Nos. 25-CA-22501, 25-CA-22549, 25-CA-23157, 25-CA-23386

ARGUED SEPTEMBER 4, 1996 – DECIDED FEBRUARY 21, 1997

Before CUMMINGS, COFFEY, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Dilling Mechanical Contractors, Inc. ("Dilling") petitions this court for a review of the National Labor Relations Board's ("the Board") finding that Dilling violated 29 U.S.C. § 158(a)(1) and (a)(3). The Board determined that Dilling committed § 8(a)(1) and (a)(3) violations by failing to reinstate unfair labor practice strikers after they had made an unconditional offer to return to work. Dilling appeals the Board's order. In turn,

the Board cross-petitions for enforcement of its order. We deny Dilling's appeal and enforce the Board's order.

I. History

Dilling is an industrial contractor that employs about 100 people and has its main office in Logansport, Indiana. The bulk of Dilling's business is divided between electrical contract work and mechanical work – which includes all of Dilling's other construction trades.

Beginning in 1992, the International Brotherhood of Electrical Workers Union ("IBEW") was successful in organizing many of Dilling's electrical contract workers. In the later part of 1992, Dilling performed work on the Essex Wire facility, located in Franklin, Indiana, more than 50 miles from Dilling's main office in Logansport. After the work at Essex Wire began, Dilling transferred virtually all IBEW supporters to that job site. Dilling then employed Roger Seely, an ex-Navy Seal with no electrical work experience, to serve as the Essex Wire job site "expeditor." As the expeditor, Seely's duties included the enforcement of company rules and insuring that the workers performed their duties in a manner that was satisfactory to Dilling's management. In short, the record readily demonstrates that Dilling brought in Seely to intimidate and berate employees who supported the IBEW.

In response to Dilling's heavy-handed tactics, on April 12, 1993, five of Dilling's employees, all of whom were members of the IBEW, ceased work in a concerted effort at the Essex Wire job site and engaged in an unfair labor practice strike. Those employees were: Robert

Guinn, Gene Kaufman, Donna Serna, Michael Boatman, Sr. and Michael Boatman, Jr. After approximately one week of picketing, however, the strikers collectively decided to return to work. On April 20, 1993, three of the strikers – Guinn, Serna and Kaufman – went to speak with Dilling's supervisor at the Essex Wire job site to inquire about returning to work. When Guinn asked if all the strikers could return to work, the job site supervisor, Glenn Click, told Guinn and the others that they would have to speak with company president, Dick Dilling, because as far as the company was concerned, the strikers were "considered to have quit." Following Click's response, the strikers resumed picketing outside the Essex Wire job site. Additionally, the strikers began picketing at Dilling's headquarters in Logansport.

On the same day that Guinn spoke with supervisor Click, the union, on behalf of the strikers, faxed a letter to Dick Dilling at the company's headquarters making an unconditional offer to return to work. Dilling did not respond. Although Dilling's management was aware that the strikers were picketing outside their headquarters, nothing was said to the strikers about returning to work.

Three months later, on July 27, 1993, the strikers, through the IBEW, sent a second letter to Dilling, reaffirming their unconditional offer to return to work. Dilling did respond to this letter on August 4, 1993, indicating that the company had no record of the strikers' previous unconditional offer to return to work. Furthermore, Dilling's response stated that the strikers had been given, but subsequently refused, an opportunity to return to work for Dilling.

The workers sent yet another letter to Dilling on April 20, 1994, asking again for reinstatement to their old jobs. Dilling did not respond and the IBEW eventually filed unfair labor practice charges against Dilling for failing to reinstate the strikers. After extensive hearings, the ALJ determined that Dilling's refusal to reinstate the strikers violated § 8(a)(1)[1] and (a)(3)[2] of the National Labor Relations Act. In turn, the Board adopted the ALJ's recommended order.

II. Standard of Review

We will uphold the Board's order if "substantial evidence on the record as a whole supports its factual findings and if its conclusions have a reasonable basis in the law." *Carry Cos. of Illinois v. NLRB*, 30 F.3d 922, 926 (7th Cir. 1994) (citing *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 716 (7th Cir. 1992)); *see also* 29 U.S.C. § 160(e), (f). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305

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[1] Section 8(a)(1) prohibits an employer from interfering with the rights guaranteed in § 7 of the Act. 29 U.S.C. § 158(a)(1).

Section 7 provides, in part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . [and] to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

[2] Section 8(a)(3) forbids an employer from "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

U.S. 197, 229 (1938)). While it is not our job to engage in fact finding or to replace the Board's reasonable conclusions, a mere cursory review of the record is insufficient. Instead, we must take into account the entire record – which would include any evidence contrary to the Board's view. *See Chicago Tribune*, 962 F.2d at 716. Nonetheless, "an ALJ's credibility determinations are entitled to considerable deference and will be overturned by a reviewing court only when extraordinary circumstances so require." *Carry Cos.*, 30 F.3d at 926; *accord NLRB v. Advance Transport Co.*, 979 F.2d 569, 573 (7th Cir. 1992).

III. Analysis

We begin with the well-settled principle that "unfair labor practice strikers are entitled to reinstatement upon making an unconditional offer to return to work." *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1188 (7th Cir. 1990); *accord Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 292 (7th Cir. 1989). Accordingly, an employer violates § 8(a)(1) and (a)(3) of the Act when he fails to offer immediate reinstatement to unfair labor practice strikers who have made an unconditional offer to return to work. *Richmond Recording Corp.*, 836 F.2d at 293-94.

Dilling vigorously disputes the Board's determination that it committed § 8(a)(1) and (a)(3) violations by failing to reinstate the strikers after they had offered to return to work unconditionally. Dilling's argument is premised upon two assertions: a) the strikers did not make an unconditional offer to return to work; and b) the

company president, Dick Dilling, attempted to reinstate the strikers but they refused.

A. The Unconditional Offer to Return to Work

Dilling contends that there was no substantial evidence for the Board to determine that the strikers made an unconditional offer to return to work. In fact, it is Dilling's position that no such offer was made by the strikers and thus, Dilling had no duty to reinstate them. In this regard, however, we have held that the employer bears the burden to demonstrate that the offer to return to work was not unconditional. *See NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1472 (7th Cir. 1992). Furthermore, "[t]he Board's finding of an unconditional offer is a predominantly factual determination, which we must uphold if supported by substantial evidence." *Id.*

Notwithstanding Dilling's assertion, our review of the record reveals that the strikers did indeed make an unconditional offer to return to work. At approximately 7:00 a.m. on April 20, 1993, Bob Guinn, accompanied by Gene Kaufman and Donna Serna, drove to the Essex Wire job site. Guinn recounted that upon their arrival he told the supervisor, Glen Click, that "we was ready to come back to work if [Click] would take us back." Guinn's recollection is substantiated by the testimony of strikers Kaufman and Serna – both of whom were present during the conversation.

Instead of reinstating the strikers, however, supervisor Click told Guinn and his fellow strikers that they

"had been replaced" and that the company had "considered the strikers to have quit." Following Click's comments, the record indicates that Guinn and the other strikers resumed picketing. Shortly after Guinn and his fellow strikers resumed their picketing, the IBEW faxed Dilling the following letter:

> This letter is to notify you that as of 7:00 A.M., 20 April 1993 the Organizing Committee has unconditionally called off their Unfair Labor Practice Strike against Dilling Mech./Elec. Contractors and returned to work. They have reported to the Essex Wire job site of which they were last assigned and are ready to go back to work.
>
> If you have any questions, please contact Ed Butler with I.B.E.W. Local 668 at 317-474-1021.

Additionally, the record discloses that over the course of the next year, the IBEW made at least two more attempts to notify Dilling that its members would return to work unconditionally. Letters were sent to Dilling on July 27, 1993[3] and on April 20, 1994[4] specifically reaffirming the strikers' original offer.

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[3] The strikers' July 27, 1993 letter, in part, reads as follows:

> . . . We wish to remind you that the following employees of Dilling Mechanical/Electrical did issue you an unconditional return to work, following their strike and still wish to return to work for your company. . . .

[4] The strikers' August 20, 1994 letter reads as follows:

> This letter is to restate and to remind you that on April 20, 1993 and several occasions since then, the organizing committee of IBEW Local 668 made an unconditional offer to return to work on behalf of the Unfair Labor Practice Strikers.

Based on the foregoing, there is substantial evidence to support the Board's conclusion that Guinn's statement to supervisor Click at the Essex Wire job site – that they were "ready to come back to work" – was sufficient to notify Dilling that the strikers were making an unconditional offer to return to work. Substantial evidence also exists to support the Board's finding that the April 20, 1993 fax sent to Dilling served as further notice that the strikers sought to return to work unconditionally. *See generally Lapham-Hickey Steel Corp.*, 904 F.2d at 1180.

Not only did the Board have before it Guinn's oral offer on behalf of the strikers to return to work unconditionally, but it also had the April 20 letter, as well as the two subsequent letters sent by the IBEW on behalf of the strikers. These facts are certainly adequate to support the Board's conclusion that the strikers notified Dilling of their unconditional offer to return to work.

Finally, Dilling contends that there was no actual unconditional offer to return to work because the strikers resumed picketing immediately following Guinn's conversation with Click on April 20, 1993. Dilling's position is simply without merit. The resumption or the continuance of a union's picket line is not inconsistent with the

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As we have stated before, the ULP Strikers are willing to discontinue their strike and return to work. If you do not have a means to contact any of the strikers, you can get in touch with them by calling Ed Butler at 317-474-1021, Monday thru Friday from 8:00 a.m. until 5:00 p.m.

If you have any questions regarding this matter, please do not hesitate to contact Ed Butler.

union's unconditional offer to return to work. *Harris-Teeter Super Markets, Inc.*, 242 NLRB 132, 101 LRRM (BNA) 1130, *available in* 1979 WL 9061, at *40 (1979), *enforced, sub nom. NLRB v. Harris-Teeter Super Markets, Inc.*, 644 F.2d 39 (D.C. Cir. 1981).

B. The Employer's Offer for Reinstatement

Dilling presents the additional argument that it made a valid offer to reinstate the strikers, even though it claims that the strikers failed to make an unconditional offer to return to work. Dilling supports its assertion on the following premise: on April 20, 1993, while at the Essex Wire job site, supervisor Click told Guinn that the striking employees were considered to have quit their jobs and that they should "set up an appointment with Dick Dilling if they wanted their jobs back"; and Dilling offered the testimony of president Dick Dilling – stating that he made himself available for striker reinstatement appointments beginning April 20, 1993 and that no striker called him asking for reinstatement. Therefore, Dilling asserts that the strikers' unwillingness to contact Dick Dilling amounted to a "refus[al] to avail themselves of the opportunity" of reinstatement.

The Board had before it the following evidence on the issue of an offer of reinstatement. First, supervisor Click's statement to Guinn was, at best, ambiguous. Telling the strikers that they had quit and had been replaced was merely a rebuff of the strikers' return to work offer. Second, Dilling gave no meaningful response to the IBEW's letters of April 20, 1993, July 27, 1993, and April 20, 1994 – all of which requested that Dilling contact the

union regarding reinstatement of the strikers. In its single reply (made to the IBEW's July 27, 1993 letter), Dilling sidestepped the strikers' unmistakably clear offer to return to work unconditionally. The union's letters, written on behalf of the strikers, were of no avail. It is obvious, as the Board found, that Dilling's response to the union was spurious. Third, neither Dilling's president nor anyone on behalf of the company made any attempt to contact the strikers about reinstatement, despite the fact that Dilling's management was aware that the strikers were picketing outside Dilling's headquarters.

Accordingly, it is abundantly clear from the record that substantial evidence demonstrates that the Board correctly concluded that Dilling did not make an offer of reinstatement.

IV. Conclusion

For the reasons stated above, we Deny Dilling's petition and Enforce the Board's order.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U.S.
FILED

(2)

97 - 84 JUL 0 2 1997

No. _____

In The

Supreme Court of the United States

October Term, 1996

DILLING MECHANICAL CONTRACTORS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 668, AFL-CIO and INDIANA STATE PIPE TRADES ASSOCIATION, UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, AFL-CIO,

Intervening Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS *srh*

For the Seventh Circuit
Chicago, Illinois 60604

May 16, 1997

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

DILLING MECHANICAL CONTRACTORS, INCORPORATED, Petitioner/Cross-Respondent, Nos. 95-3407 and 95-3641 v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 68, AFL-CIO and INDIANA STATE PIPE TRADES ASSOCIATION, UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, AFL-CIO, Intervening Respondents.	Petitions for Review of an Order of the National Labor Relations Board Nos. 25-CA-22501, 25-CA-23157, 25-CA-22549, and 25-CA-23386.

The following is before the court: **MOTION FOR STAY OF MANDATE,** filed on May 12, 1997, by counsel for the petitioner/cross-respondent.

The agency closing letter in this case issued on April 14, 1997. Accordingly, the motion for stay of mandate will be construed as a motion to recall the agency closing letter. The motion is **DENIED.**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DILLING MECHANICAL CONTRACTORS, INC.	Cases
and	25-CA-22501-1 Amended
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 668, AFL-CIO	25-CA-22501-2 Amended 25-CA-23157
and	25-CA-22549
INDIANA STATE PIPE TRADES ASSOCIATION, UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, AFL-CIO	
and	25-CA-23386
PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 166, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA	

Walter Steele, Esq.,
of Indianapolis, Indiana
for the General Counsel

Michael L. Einterz, Esq.,
of Indianapolis, Indiana
for the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge: Upon charges filed in Cases 25-CA-22501-1 (amended) and 25-CA-22501-2 (amended) by the International Brotherhood of Electrical Workers, Local Union No. 668, AFL-CIO (herein called Electrical Workers), and upon a charge filed in Case 25-CA-22549 by the Indiana State Pipe Trades Association (herein called Pipe Trades Association), a consolidated complaint and notice of hearing issued on July 27, 1993, against Dilling Mechanical Contractors, Inc. (herein called Dilling or Respondent). Upon a charge filed in Case 25-CA-23386 by Plumbers and Steamfitters Local Union No. 166 (herein called Plumbers),[1] an order consolidating cases, consolidated complaint and notice of hearing issued on October 3, 1994, in Cases 25-CA-22501-1 (amended), 25-CA-22501-2 (amended), 25-CA-22549, and 25-CA-23386 (amended) against Respondent. After further amendments, an order consolidating cases, consolidated complaint and notice of hearing issued on November 30, 1994, alleging that

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[1] The unions involved in these consolidated cases will be collectively referred to as the "Unions."

Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (herein called the Act).

Hearing was held in these matters in Lafayette, Indiana, on March 6-9, 1995. Briefs were received from the parties on or about April 10, 1995. Based upon the entire record including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office and principal place of business in Logansport, Indiana, has been engaged in the construction industry as an electrical, mechanical, and general contractor. Respondent admits the jurisdictional allegations of the complaint and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Involved Labor Organizations

Electrical Workers, Plumbers, and Pipe Trades Association are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background and the Issues Framed by the Complaint.

Dick Dilling incorporated Respondent in 1980 and serves as its president. His wife is secretary treasurer and a nephew, Eric Ott, is vice-president. Respondent is an industrial contractor offering turnkey industrial work, process piping, and electrical work. Its main office is in Logansport, IN, and it maintains branch offices in Fort Wayne and Warsaw, IN. Dilling employs about 100 people in virtually every discipline in the construction industry. The bulk of its business is in what it calls process piping, such as steam, chemical, and gas piping. On the mechanical side of the business, management consists of Eric Ott, Jack Koehne, Frank Freeman, Jerry Bunn, and Bill Drinkwine and Richard Eldridge. On the electrical side of the business, management consists of Glen Click and Fred Williams.

During all or part of 1992, 1993, and 1994, Dilling provided electrical and/or mechanical contracting services at, inter alia, construction sites denoted as the Logansport Memorial Hospital, the TRW jobsite, the Morton jobsite, the Essex jobsite, the Weaver Popcorn jobsite, and the R.R. Donnelly jobsite. Respondent has admitted the supervisory or agency status of the following employees: Richard Dilling, owner; Beverly Dilling, secretary; Jerry Bunn, field superintendent; Glen Click, field superintendent; Dick Eldridge, mechanical field supervisor; Jack Koehne, project manager; Ed Queen, foreman; Roger Seely, project supervisor; Fred Williams, electrical

division director; and, Paul (surname unknown), acting mechanical superintendent on the R.R. Donnelly jobsite.

Beginning in 1992, the two Unions involved herein began an attempt at organizing the electrical, plumbing, and pipefitting employees of Respondent. The Electrical Workers were evidently the most active in this regard and managed by the beginning of 1993 to have active support from about 50 percent of Respondent's electrical employees. The number of employees supporting the efforts of the Pipe Trades Association and Plumbers is not documented in the record. At about this time, the campaigns became known to Respondent and the names of electrical workers union activists also became known. As the evidence detailed below will demonstrate, Respondent responded vigorously to stop the spread of union support and to rid itself of the known union adherents.

On the electrical and mechanical sides of its business, Respondent began vigorously enforcing company rules and creating rules to provide a means of disciplining these employees and to stifle organizational activities. In addition, on the electrical side, it transferred virtually all known union supporters to one job, the Essex jobsite, and thereafter imposed a supervisor on that job whose clear purpose was to harass the supporters. In the weeks that followed this move, some employees quit, some were laid off and the remainder went on strike. The complaint alleges that the layoffs were discriminatorily motivated, and the strike was an unfair labor practice strike. Three employees quit their employment from the Essex jobsite and they are alleged to have been constructively discharged. I agree in part with these allegations. The strike was certainly an unfair labor practice strike and I believe

one employee was constructively discharged. The layoff, however, appears to be economically motivated. Shortly after the involved strike began, the employees involved in it made an unconditional offer to return to work. The Respondent's action in response to that offer is alleged to be a refusal to reinstate and thus the strikers were terminated. I agree with this allegation.

With respect to the campaign involving plumbing employees, the Respondent is alleged to have violated the Act in certain, more isolated incidents. Specifically, the complaint alleges that Respondent has committed unfair labor practices through the actions of one or more of its supervisors or agents, as follows:

1. (a) About December 2, 1992, by Dick Eldridge, at the trailer at the Logansport Memorial Hospital jobsite, threatened employees with discharge if they engaged in union and protected concerted activities.

(b) About December 7, 1992, by Fred Williams, in one of Respondent's trucks, informed employees that an employee's demotion from foreman was because of his union and protected concerted activities.

(c) About January 6, 1993, by oral announcement of Fred Williams, at the TRW jobsite, imposed more onerous and rigorous terms and conditions of employment on its electrical worker employees when it:

(i) instituted more strict enforcement of its rules of conduct and employment rules because its employees engaged in union and protected concerted activities; and

(ii) changed its former break policy to more severely restrict electrical employees' freedom of movement on the jobsite because its employees engaged in union and protected concerted activities.

(d) About January 6, 1993, by oral announcement at the TRW jobsite, promulgated and since then has maintained a rule restricting employees' union activities to their time off and away from Respondent's premises.

(e) About January 8, 1993, by Glen Click at the Morton jobsite, interrogated its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(f) About January 15, 1993, by Glen Click at the Morton jobsite, interrogated employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(g) About February 8, 1993, and thereafter in February, March, and April of 1993, by Roger Seely, at the Essex jobsite, subjected certain of its employees to more strict surveillance of their work product, inclusive of standing over and near employees while they worked, physical intimidation, and verbal abuse because they engaged in union and protected concerted activities.

(h) About February and March of 1993, by Roger Seely, at the Essex jobsite, by taking photographs of employees involved in picketing, engaged in surveillance of employees engaged in union and protected concerted activities.

(i) About February 18, 1993, by Roger Seely at the Essex jobsite, threatened employees with discharge because they engaged in union and protected concerted activities.[2]

(j) About May 31, 1993, by Jerry Bunn, at the Weaver Popcorn jobsite:

(i) instructed employees to cease their union and protected concerted activities; and

(ii) created an impression among employees that their union and protected concerted activities were under surveillance by Respondent.

(k) About August 3, 1994, by Ed Queen at the R.R. Donnelly jobsite:

(i) prohibited employees from discussing union-related subjects during work time;[3] and

(ii) prohibited its employees from wearing or otherwise displaying union insignia.

(l) About August 8, 1994, by Ed Queen at the R.R. Donnelly jobsite, threatened to discharge an employee because he wore clothing bearing union insignia.

(m) About August 9, 1994, by Paul (surname unknown), at the R.R. Donnelly jobsite, prohibited

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[2] There is no proof in the record to support this allegation and I recommend it be dismissed.

[3] There is no proof regarding this allegation and I recommend it be dismissed.

employees from wearing or otherwise displaying union insignia.

(n) About August 9, 1994, by Ed Queen at the R.R. Donnelly jobsite:[4]

(i) impliedly told employees that it was imposing more onerous and rigorous terms and conditions of employment on its mechanical employees at the jobsite, because they had joined, formed, or assisted the Plumbers.

(ii) threatened to discipline its mechanical employees at the jobsite because they had joined, formed, or assisted the Plumbers.

2. (a) About January 11, 1993, Respondent issued verbal reprimands to its employees David Hicks, J.E. Culpepper, and John Culpepper.

(b) About February 8, 1993, imposed more onerous and rigorous terms and conditions of employment on its electrical worker employees at the Essex jobsite, by assigning Roger Seely to oversee their work and handle all personnel matters.

(c) The Respondent caused the termination of its below-listed employees about the date listed beside their names by the conduct described above in paragraphs 1(g), (h), and (i) and 2(a) and (b):

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[4] There is no proof in the record regarding the following two allegations relating to Ed Queen and I recommend they be dismissed.

John Culpepper	–	February 9, 1993
David Hicks	–	February 22, 1993
J.E. Culpepper	–	March 3, 1993

(d) About February 10, 1993, Respondent imposed more onerous and rigorous terms and conditions of employment on its electrical worker employees by introducing a production quota system at the Essex jobsite.

(e) About March 16, 1993, Respondent issued a written reprimand to its employee Lanis Smith.

(f) About April 8, 1993, Respondent laid off its employees Bill Bishop, Albert Cadwallader, Jeff Guinn, and Lanis Smith, and since that date has refused to reinstate these employees.[5]

(g) Between August 3 and August 11, 1994, Respondent imposed more onerous and rigorous terms and conditions of employment on its employee Thomas J. Zent at the R.R. Donnelly jobsite, including but not limited to, restricting the length of his break periods and monitoring his use of safety glasses.

(h) About August 8, 1994, Respondent terminated its employee Thomas J. Zent.

3. (a) Since about April 12, 1993, certain employees of Respondent employed at the Essex jobsite ceased work concertedly and engaged in a strike caused

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[5] In the transcript, Bishop is referred to as Robert Bishop. Every bit of documentation in the record however refers to him as Bill, and he will be referred to hereinafter as Bill Bishop.

by Respondent's unfair labor practices described above in paragraphs 1(g), (h), and (i), and paragraphs 2(b) and (c).

(b) About April 20, 1993, by letter dated April 19, 1993, sent via facsimile, and by oral announcement, all employees who had engaged in the strike made an unconditional offer to return to work.

(c) Since about April 20, 1993, Respondent has failed and refused to reinstate the striking employees who made the unconditional offer to return to work to their former positions of employment or to substantially equivalent positions.

(d) About April 20, 1993, Respondent, by failing to reinstated [sic] the involved strikers, caused their termination.

B. The Organizing Campaign by the Electrical Workers

Respondent's electrical employee Robert Guinn was called by the Electrical Workers local business agent, Ed Butler, at some point prior to August 1992, and was asked to help organize Respondent's electricians. Guinn testified he told Butler he would help if the Local Union would issue him a membership card in the Union. Butler agreed and Guinn was made a member of the Local Union on August 13, 1992. Thereafter, Guinn talked to employees and encouraged them to sign authorization cards. He himself signed a card in August 1992. At the time he agreed to aid the organizational effort, he was an electrical foreman for Respondent. He was demoted from

foreman to a journeyman position in December 1992. He had held the foreman's position since 1989 or 1990.

Joel Lafleur worked as an electrical foreman for Respondent from January 1992, until April 1993. He is a member of Local 668 and before that was a member of another IBEW local in Louisiana. He contacted Butler in December of 1991 and asked if Butler wanted him to engage in any organizing for him. Butler said he was trying to organize Dilling, but that Respondent was not taking employee applications at the time. Lafleur noted he had worked for Dilling before and said he would call and see if he could get hired. He called and was hired, and thereafter stayed in contact with Butler, informing him about what was happening at the Company. During his employment interview with Respondent's electrical project supervisor, Fred Williams, Williams asked him if he was there to organize and Lafleur replied that he had not organized the Company when he last worked for it in 1988. Williams said, "Okay, I just don't want any union trouble."

Robert Guinn's son Jeff worked for Respondent for about 2 years prior to his layoff from the Essex job in April, 1994. He was employed as a laborer and electrician apprentice, and worked on a number of jobs until he was assigned to the Essex job. He signed an authorization card with the IBEW in August 1992 and was a member of the Union's organizing committee.

Gene Kaufman was employed by Respondent as an electrical apprentice from July 2, 1990, until he went on strike in April 1993. He signed an authorization card in

August 1992 and was a member of the Union's organizing committee.

Lanis Smith was employed by Respondent in November 1992 and worked as either a journeyman electrical or electrical foreman until he went on strike in April, 1993.[6] He signed an authorization card with the Local Union about the time he went to work for Respondent, but did not actively engage in organizing until after the first of the year 1993. He was a member of the organizing committee, wore union stickers, and engaged in informational picketing at the Essex jobsite.

Albert Cadwallader was hired as an electrical apprentice by Respondent in November 1992 and worked in that capacity until his layoff in April 1993. He signed an authorization card in December 1992, was a member of the organizing committee, and wore a union tee shirt at work.

Donna Serna (Hoaks) was hired as a journeyman electrician in November 1992 and worked in that capacity until the strike in April 1993.[7] She signed an authorization card on January 4 and was listed as a member of the organizing committee. After January 4, she wore a union tee shirt and affixed union decals to her personal property.

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[6] Smith is referred to in this record as Lanis, Lanny, and Lanie Smith. In the interest of clarity, he is referred to as Lanis throughout this decision.

[7] Subsequent to the events in question, this individual was married and is now known as Donna Hoaks. However, references in the transcript to her are in the name Serna, and that is how she is referred to in this decision.

John Culpepper, his brother J.E. Culpepper and David Hicks are union journeymen electricians hired by Respondent in November 1992. Their union affiliation was known by Respondent at the time of hiring. They worked until they quit at various times in February and March 1993. They were all members of the union organizing committee.

During the fall of 1992, the Union conducted meetings of those employees who were aiding in the organizing effort. On January 4, 1993, Butler sent to Dick Dilling a letter advising him that employees named in the letter were members of the Union and would be engaged in organizing other of Respondent's employees. The employees listed as comprising the Union's organizing committee were:

Bob Guinn	Mike Boatman, Sr.
Bill Bishop	Lanis Smith
Jeff Guinn	Mike Boatman Jr.
Albert Cadwallader	J.E. Culpepper
John Culpepper	David Hicks
Gene Kaufman	Donna Serna
Ed Winegardner	

After this letter was sent, some of the named committee members wore union insignia to work, including wearing union tee shirts and placing union stickers on their hats and tool boxes.

Dick Dilling responded by letter shortly thereafter, stating that he respected all of his employees' rights, and that those rights would not be violated by Dilling. He

also requested that the organizing committee not attempt to violate any of his employees' rights either.[8]

An RC petition was filed by the Union on January 13, 1993, in Case number 23-RC-9219. At this time, the electrical union supporters comprised about half of all Respondent's electrical employees.

C. Alleged Violations of Section 8(a)(1) Involving Electrical Employees

1. Respondent Did Not Violate the Act with respect to Bob Guinn's Demotion Because of his Union support (Complaint Allegation 1 (b).[9]

Robert Guinn was employed by Respondent in 1977 or 1978 as a journeyman electrician and then left that employment. He was again employed in 1989 as a journeyman and a few months later was promoted to foreman and given the responsibility of being in charge of completion of the electrical work on various of Respondent's

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[8] This letter is referred to in the testimony of several witnesses and I have seen the letter. Both General Counsel and Respondent's counsel refer to it in their briefs, citing it as Respondent's Exhibit No. 1. However, the official set of exhibits in this record does not include the letter and it is not listed as an exhibit in the official transcript. Respondent's Exhibit No. 1 in the official exhibits is an August 4, 1993 letter relating to the strike.

[9] The complaint allegations set out above correspond exactly to the complaint, but have been renumbered. The numbers used herein refer to the allegations as renumbered above.

jobs, in the course of which he supervised other electricians employed by Respondent. He was demoted back to journeyman in December 1992. He was told by Fred Williams that Dick Dilling ordered the demotion because he had left a job after 10 hours, calling in another electrician to fix a problem that had developed on the job. Williams also told him that the demotion was caused by Guinn's union activities, not specifying what activities to which he had reference. The reason given by Dilling was in fact true, Guinn had left the job in violation of company rules that required the foreman to remain on a job as long as it was working. This was the only job Guinn could remember where he had left contrary to the rules. However, even giving full credence to the asserted fact that it was Guinn's union activity that was behind the demotion, no violation of the Act occurred.

Joel Lafleur testified that Donny Thompson, a journeyman on a project over which he was foreman, was transferred to another job to take over as foreman for Bob Guinn. Specifically, Lafleur testified that when Thompson said that he was making this move, he told Thompson that he thought it was Fred Williams' project. Thompson replied, "Well, they have got a organizing campaign going. Cole Zartman and Bob Guinn are behind it." Lafleur asked if Williams said what happened to Guinn, and Thompson replied, "No. He didn't say anything else except he was going to be running the job that Bob Guinn was running." Guinn's activities were known to management as he had tried to persuade Electrical Field Superintendent Glen Click to join the Union in December 1992.

The demotion itself did not violate the Act because it involved a supervisory position and did not fall into one

of the exceptions to the rule that discharging or disciplining supervisors for engaging in union activity is not violative.[10] The Board has held that if a Respondent seeks to use an otherwise lawful discharge to threaten employees, an 8(a)(1) violation may be found on the basis of such a threat. *David-Anne Corporation, d/b/a/ Snyder Bro. Sun-Ray Drug,* 208 NLRB 628 (1974). Here the only person that the evidence reflects that was told that the demotion was because of union activity was Guinn himself. Lafleur may have drawn the assumption that Guinn's union activity was the reason for his removal as supervisor, but Thompson indicated that Williams did not say what happened to Guinn and certainly did not issue a threat. For Williams to tell Thompson, who was being assigned to supervise the job, that there was a union organizing campaign going on certainly would not violate the Act. Based on the evidence presented, I cannot find that the demotion of Guinn violated the Act in any way.

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[10] The discharge or demotion of a supervisor is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. *Parker-Robb Chevrolet, Inc.,* 262 NLRB 402, 404 (1982).

2. Respondent Violated Section 8(a)(1) of the Act by Discriminatorily Increasing Enforcement of its Employee Rules and by Creating New Rules in Response to the Organizing Campaign. (Complaint Allegations 1(c)(i), (ii), (d) – The TRW Jobsite Meeting)

Respondent, at least since 1990, has maintained written rules governing employee conduct, including rules setting time limits on employee breaks and lunch periods, call-in time requirements for planned or emergency absences from work, and a progressive disciplinary system.[11] Though Respondent's witnesses assert that a copy

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[11] Respondent's rule regarding breaks and lunch is as follows:

"A ten minute break will be allowed from 9 a.m. to 9:10 a.m. Lunch time will be from 11:30 a.m. to 12 p.m. A ten minute break will be allowed from 2 p.m. to 2:10 p.m. If Owner or other crafts on a particular job cause a change in times we will be forced to adjust same."

Its rule on tardy and absenteeism is as follows:

"If tardy for personal reasons or unexpected problems, an employee is required to contact the office by 6 a.m. Tardiness will be accepted when this rule is followed. If a call is not received by 6 a.m. disciplinary action will be taken. Absenteeism – If a personal day off is required by an employee, three days advance notice must be given to your job foreman. If notification is not given, disciplinary action will be taken."

The rule on disciplinary action is as follows:

"All individual disciplinary action occurrences will be identified as follows: 1st – Verbal Warning; 2nd – Write-Up Slip; 3rd – Five Day Release Without Pay; and 4th – Termination. Employees can have individual occurrences removed from their work record at the completion of every 180 day work period that is disciplinary free."

of these rules was given to all new employees, only one or two employee witnesses could remember receiving one. However, even though they might not have received a copy of the rules, the employees testifying in this case all knew the rules regarding breaks, lunch periods, and call-in times. I find from the evidence that Respondent had these rules in place and that in some fashion made them known to employees before any union organizing activity took place.

On the other hand, the evidence makes clear that these rules were not strictly enforced prior to the organizing campaign. The evidence reflects that they were generally adhered to, but that individual foremen allowed some flexibility, for example, allowing more time for breaks. For at least the electrical employees and certainly for the known union supporters, this changed following the January 4 letter naming the organizing committee.

The primary evidence on this point relates to a meeting held January 6, 1993, at Respondent's TRW jobsite. The TRW job was being run by Lanis Smith.[12] He supervised up to 10 electricians on that job. There were also Dilling mechanical employees on this job including pipefitters, carpenters, and painters. Shortly after the January 4, 1993 letter was sent and the union supporters began wearing union insignia to work, there was a meeting of electricians called on the TRW job by Fred Williams and Glen Click.

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[12] The Respondent uses the phrase "run a job" synonymously with being the job foreman.

According to Smith, the employees were told about safety rules and regulations, and then about other rules. He testified that management said that they had two 10-minute breaks, and that going to a break facility was part of the 10 minutes.[13] They were also told that if they abused the rules, they would get a verbal warning, a written warning, suspension, and then termination. Additionally, they were told that they were expected to be at work every day, and that if they were not coming to work, they must call in by a certain time to notify the office of the absence. The employees were also warned about talking about union organizing on the job.

According to Serna, Williams said the employees would all be getting copies of the company policy, but that he wanted them to be aware of it at that time. He covered absenteeism, late calls-in, breaks and lunch periods, conduct on the job and what was expected from a safety standpoint. He said breaks would be exactly 10 minutes and would be taken in the employee's immediate work area. According to Serna, this was a new practice as she had been taking breaks with TRW employees in their breakroom. The employees were told that management would follow disciplinary policy and the employees were to watch their step. The meeting was only held with electrical employees, though mechanical employees were working on the TRW job.[14]

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[13] Though the 10-minute time was not new, the evidence reflects that going to and from the place where breaks were taken was not theretofore included in the break time.

[14] At about the same time, a similar meeting was held with the electrical workers at the Essex jobsite.

According to Guinn, Williams told the assembled employees that from that moment on, the Company would enforce its rules by the book; i.e., breaks would be taken in place, rather than at the gang box, the time limits on breaks and lunches would be adhered to, there would be no talk among employees about the union except on employees own time, and call-ins would be monitored. It should be noted that the prohibition about talking related only to the topic of unions, no other topic was off limits. He added that reprimands would be by the book and that employees would be fired if they did not follow the rules outlined. According to Guinn, this was a departure from past practice. Before this meeting, the electricians on the TRW job had taken their breaks at the gang box.

Also attending this meeting were union supporters Robert Bishop and Albert Cadwallader. Their testimony was similar to that of Guinn, Smith, and Serna regarding the meeting. All of the witnesses considered that the requirement to take breaks in place to be a new rule, the restriction against talking about the union to be a new rule, and the strict enforcement of the rules to be a new practice. Before this meeting, there had been no restrictions on when employees could talk or with respect to subject matter.

Given the timing of the meeting, shortly after the January 4 letter, the fact that only electrical employees were part of the meeting, and the new restrictions about talking about the Union, I find that Respondent's actions

in this regard were discriminatorily motivated.[15] I therefore find unlawful its threat to strictly enforce its rules, and its institution of a rule governing where breaks could be taken and its new prohibition against talking about the Union except at lunch and before and after work. Such rules were clearly aimed at inhibiting interaction among employees and the organizing effort and thus served to restrain and interfere with employees' Section 7 rights.[16]

3. Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Gene Kaufman by Glen Click at the Morton jobsite (complaint allegations 1(d) and (e)).

Gene Kaufman was working at this Morton jobsite as an electrician in early January 1993. He testified that he was asked by Glen Click how the organizing drive was going and what the Union was doing with respect to organizing. Kaufman told him that he was not allowed to talk about the Union on the job, but would talk with him after work if he wanted. By this time, the Respondent's rule against talking about the union at work was in effect. About 2 weeks to a month later, the two had a similar conversation. Kaufman testified that Click never took him up on the offer to talk after work and admitted that he asked Click to join the Union. For his part, Click testified

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[15] *Capitol EMI Music, Inc.*, 311 NLRB 997 (1993); *Emergency One Inc.*, 306 NLRB 800 (1992); *Cooper Tire & Rubber v. NLRB*, 957 F.2d 1245, *cert. denied*, 113 S.Ct. 492 (1992).

[16] *Best Plumbing Supply, Inc.*, 310 NLRB 143, 144 (1993); *American Warehousing & Distribution Services, Inc.*, 311 NLRB 371 (1993).

that Kaufman informed him about the union campaign in November 1992 but did not elaborate.

Interrogations of employees by supervisors regarding union activity is to be viewed from the totality of the circumstances. Click should have known that Kaufman was a union supporter from the fact that Kaufman was named as a member of the organizing committee in the January 4 letter; however, he disclaimed any knowledge of that letter. Even assuming that Click knew that Kaufman was an active and open supporter of the Union, I still find the interrogations unlawful. Kaufman was not shown to have initiated a conversation where the topic of the union came up. He was not shown to be particularly close to Click and on the other hand, from his response to the interrogation appeared somewhat leery of Click's intentions. Respondent had just instituted a new rule prohibiting talking about the Union at work. Kaufman knew the rule and deferred answering any questions about the Union until after working hours. Moreover, given the negative response management had taken with respect to the organizing effort after learning of it, the interrogation becomes coercive in my opinion. There is also no legitimate reason shown for asking about the status of the organizing effort. As noted earlier, Dick Dilling had responded to the January 4 letter with one of his own expressing no intention of violating his employees' rights and their desire to unionize was their business alone. Therefore I find this interrogation to be in violation of Section 8(a)(1) of the Act.

D. Respondent Violated Section 8(a)(1) and (3) of the Act by its Actions Taken Against Employees at the Essex Jobsite.

1. The Assigning of Union Supporters to the Essex Jobsite and the Placement of Roger Seely to Harass Them Violated the Act.

As will be shown in detail hereinafter, Respondent apparently decided to first isolate and then eliminate the electrical workers union supporters. It did so by placing and transferring all known such supporters to the Essex Wire jobsite in Franklin, IN, after the January 4, 1993 letter.[17] It also placed on this job as "expeditor," a person having supervisory authority whose duties included enforcement of company rules and insuring the workers performed their duties in a manner satisfactory to management. Strangely, this person had no experience with electrical work and was wholly unable to gauge the adequacy of the worker's performance except by recording the quantity of work they performed daily. He was shown to have harassed the workers on the one hand, and on the other, was unable to aid them with their work because of his lack of experience. On this job, three employees quit after the expeditor's arrival, at least one of whom was clearly a constructive discharge. It laid off four workers, contrary to past practice. However there is sufficient evidence of economic motivation to overcome a finding that such layoff was motivated by Respondent's clear

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[17] The sole exception to this rule was an employee named Ed Winegardner, who is named as a committee member in the January 4 letter. I cannot find serious mention of his name in this record.

animus. When the few remaining employees on the job went on strike to protest the unfair labor practices committed on the job, the Respondent considered them to have quit their jobs, and refused to reinstate them to their jobs when they made an unconditional offer to return to work.

The numerous alleged violations of the Act on this jobsite will be discussed below.

Union supporter Joel Lafleur, worked at several jobs as a journeyman when he was asked to be foreman on the Essex job. He had never been a foreman before. He was told that only journeyman electricians would be hired for the job, so it would be easy to assign work. Lafleur was under the impression that Dilling had a lot of projects underway and all of its regular employees were busy. He understood that only new employees would be hired for the Essex job. There would be a lot of paperwork involved on the project and he would have to be in the jobsite office much of the time, so it was important to have experienced electricians working who would not need much supervision.

The job commenced in November 1992 with Lafleur in charge of two journeyman electricians, Donny Thompson and Paul Stevens. After a few weeks, Williams told him he was taking them off the job to assign them to other work. Respondent then hired and assigned to the Essex job three journeyman electricians, J.E. and John Culpepper and David Hicks. They arrived in December 1992. Lafleur considered them competent journeymen and had no problem with their work. Williams visited the

site about once a week and made favorable comments about their work.

About a day after the January 4 organizing committee letter was received by Dilling naming among others, Hicks and the Culpeppers, Click came to the job and asked Lafleur if the unions had been bothering him. Lafleur said no and Click asked if he were sure. Click said the men working for him were trying to organize a union. Thereafter, in early February, Lafleur was told by Williams that he was sending Roger Seely to the jobsite because he thought the employees on the job were taking advantage of him. He added that Lafleur's management style was not going to work well in "this situation." According to Lafleur, Williams said that "Usually we could handle this problem with the stroke of a pen. But because of the situation we can't do that. It's going to take more drastic measures, more than your nature will allow you to do. I am going to use Roger Seely to take care of the pickets."[18]

Williams told Lafleur to tell the men that Seely was an expeditor and that he would be there to enforce the

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[18] Informational picketing took place at the jobsite during some part of the winter and early spring of 1993. Donna Serna, who maintained a diary of events that transpired during her employment with Respondent, put the date of this picketing as the first two weeks of March 1993. Other witnesses placed it much earlier. I do not believe that the beginning of the picketing predated Seely's arrival, thus the reference to "the pickets" may not be accurate. On the other hand, the truthfulness of Lafleur's testimony is borne out by other undisputed testimony and I credit it. Williams did not testify and thus Lafleur's testimony with regard to statements by Williams is not effectively denied.

rules. Williams added that his job was as enforcer, but they would use the title expeditor on the job. Lafleur also testified that because not all the employees sent to the job were experienced journeymen, the job required more supervision than he could give, as he was required to be in the office trailer about 60 or 70 percent of the time. Dilling contends that Seely was assigned to the job to help Lafleur improve production by being able to spend more time on the necessary paperwork. That just does not ring true. Lafleur contends that Seely was sent down to the job on the pretense of helping him in this regard. Lafleur testified that because Seely had no electrical experience, he still had to deal with the employees on a regular basis to answer their technical questions about their job assignments. Lafleur pointed out that it would have been more help to him to assigned [sic] an experienced journeyman to assist in running the job. Even Respondent's electrical field superintendent, Glen Click, testified that he would not use anyone without electrical experience to help run a job.[19]

Lafleur also testified that he was told by Williams that he wanted him to issue a disciplinary warning to the Culpeppers and Hicks for organizing on company time. It

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[19] Roger Seely served in the Navy for 28 years achieving the rank of Master Chief, E-9, Master Diver. He is 6' 1" tall and weighs about 240 pounds. After retiring from the Navy, he worked for 3 months for a company managing laborers. After that, he worked for an unspecified amount of time for the U.S.D.A., in an unspecified capacity. Prior to his assignment to the Essex jobsite, he had worked pouring concrete and running pipe for the mechanical side of Respondent's business. Dilling considered him a semi-skilled laborer.

was Lafleur's understanding that Williams had learned of the alleged organizing from another contractor on the jobsite. Following instructions, Lafleur gave them a verbal warning on or about January 11, 1993. The three employees denied doing any organizing among other employees on the job. As Lafleur was also a union supporter, there would have been no reason for them to lie about their activities. I credit their denial of such activity among the employees of another contractor. I also find this warning to violate Section 8(a)(1) and (3) of the Act because Respondent issued the warning without any investigation of the truthfulness of the alleged organizing and because Respondent did not have in place a lawful no-solicitation rule. I have already found that Respondent's rule against talking about the Union on company time to be unlawful and thus any discipline imposed for violating the rule would likewise be unlawful.[20]

After the letter of January 4, Respondent began transferring employees named in the letter to the Essex job. This was contrary to the procedure under which the job was to have been run, with all new employees. The first to arrive were Serna and Guinn, followed by Bill Bishop and Lanis Smith. The process continued until virtually all of the union organizing committee was on the job, though other jobs on which they had been working continued and other new jobs commenced. At the time these employees were sent to the Essex job, Dilling also had electrical work going at a generating plant at Logansport, IN, at a school near Logansport, and other smaller jobs. If alleged in the complaint, I would find that the act of

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[20] This violation of the Act is alleged in complaint par. 2(a).

isolating all of the electrical worker union supporters on the one jobsite is in violation of the Act because it severely interfered with and restrained their ability to organize. I would also find it a violation as it was clearly Respondent's intent to stymie their union efforts by so isolating them and as will be shown below, to get rid of them. However, as it was not alleged to be a separate violation in the complaint and the argument could be made that the matter was not fully litigated, I will decline to make such a finding. I do however find that the purpose of sending the union supporters to the Essex job was to isolate, and to get rid of them.

When Seely arrived on the job, he introduced himself to Lafleur, who in turn introduced him to the men. Shortly after this episode, Williams came to the job and told Lafleur that he wanted to have a meeting with the employees and introduce a quota system, a distinct change from Respondent's past practice. The quota system was asserted as necessary so that Seely, who was not an electrician and could not gauge productivity from experience, could measure productivity. At this point in the job, they were not behind schedule, in Lafleur's opinion. Lafleur considered some of the quotas to be reasonable, but believed the quota established for the running of conduit to be more than anyone could do because all the pipe on the job had to be bent. He related this to Williams who told him that he did not want the quotas to be too low, he wanted them to be something to aim for.[21]

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[21] The complaint, in par. 2(d), alleges the establishment of the quota system to be in violation of Sec. 8(a)(1) and (3) of the Act as it imposes more onerous and rigorous conditions of

Williams met with the electricians and began by asking who considered himself to be a journeyman, and only J.E. Culpepper raised his hand. John Culpepper had already quit and Hicks was not there that day. Williams told Culpepper that he had a quota for a journeyman and proceeded to outline that quota for him. He then introduced Seely.

After Seely's arrival on the job, Lafleur was supposed to plan the work and give Seely the electricians job assignments for the day, with Seely giving the assignments to the employees. This plan did not work out however, because the employees often had a technical question about their assignment which Seely was unable to answer. Seely did take over the job of enforcing company rules and administering discipline. Seely was given a two-way radio. In Lafleur's presence, Williams once called Seely by radio, saying, "Come in, bird dog."

Seely regularly faxed to Dick Dilling at the main office reports on the employees' performance with respect to the quotas. On one of these dates March 19,

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employment on the affected employees. I agree. The quota system was necessary, if at all, only to lend some legitimacy to the presence of Seely. As noted, because of his lack of electrical experience, he was unable to tell by looking, as could Lafleur, whether work was progressing properly. Having the system also gave him another tool for harassing the workers as he could threaten them when they failed to meet a daily quota. I find it significant that Respondent did not need the system even with Seely on the job. The job's actual progress was still monitored by Lafleur based on progress made under his work plans and assignments. He did not use the reports prepared by Seely in his progress assessment. I believe the only true purpose of the quotas was to create another rule that Seely could enforce.

1993, he wrote "Send me some more disgruntled union pukes, it's getting boring."

As noted, beginning in January 1993, and continuing thereafter Respondent did send the union supporters to the jobsite. The details of their transfer to the job and their experiences with Seely once they arrived are detailed below.

Albert Cadwallader testified that there was a meeting on the Essex job when Seely came in which Williams explained to the employees then working there that Seely would keep company policies and safety policies. He testified that thereafter Seely would watch the employees and record their daily work. According to Cadwallader, Seely would watch their work over their shoulders and time the employees' breaks.

According to Robert Guinn, Seely monitored all the electricians' work, going from area to area, and making comments with respect to the amount of work they were doing, that they were not making quota, or other derogatory comments. Guinn had never worked on one of Respondent's jobs before where there was a person used like Seely. He noted on cross-examination that on occasion Respondent had used certain employees to check on jobs and they were superior to the foremen on the jobs. They did not stay on a job and either monitor or supervise it however. These persons were also experienced electricians as opposed to someone like Seely. Guinn testified that Seely said to him that Guinn's union brother was fat and lazy, referring to another union supporter. According to Guinn, Seely strictly monitored breaks and the taking of breaks in place.

Guinn noted that on the Essex job there were quotas and Seely checked daily to see that quotas were met. He testified that Seely caught him taking an unauthorized smoke break on a couple of occasions and told him to return to work, but did not reprimand him on these occasions. Guinn testified that he complained to Fred Williams about Seely and was told by Williams that he had no control over Seely and that Seely was accountable only to Dilling.

Lanis Smith was transferred to the Essex job in March 1993. He had transferred from the TRW job to one in Rochester, IN, which he ran for about 2 weeks. He then went back to the TRW job, then went to a job in Logansport, then to Essex. According to Smith, the Logansport job was not winding down when he was transferred to Essex. When Smith went to the Essex job, Williams told him to report to Roger Seely. According to Smith, Seely stood watch over the employees, checked the time employees took to go to the bathroom, the time employees took for breaks, and took daily production statistics for the quota. Smith had not had any quotas on other jobs for Respondent, nor had employees previously had to record their daily production.

Smith wore a union sticker on his personal hard hat when he began work on the Essex project. He had worn it previously on all jobs after the January 4 letter naming him as a member of the organizing committee. The first morning of work at Essex, Seely asked him if he had a Dilling issued hardhat, and Smith said no, he had his personal hat. Seely directed him to a pile of what Smith said were dirty Dilling hard hats and told him to wear

one of them. Smith said he was not going to wear someone else's hat and he wanted a new one. Seely told him that his personal hard hat was not a Dilling-approved hard hat. The only difference between the Dilling hat and Smith's hat was its color and the union sticker. Employee Bill Bishop had a similar experience with Seely upon his arrival at the jobsite. Lafleur testified that Dilling preferred the employees wear a Dilling-issued hard hat to be uniform. He also testified, however, that employees had been allowed to wear their own hats and that some employees decorated them with personal stickers, without problem.

Seely gave Smith a written warning in March 1993, very soon after Smith transferred to the Essex job. According to Smith, there was about 10 minutes left in the workday and Smith had cleaned up his area and was preparing to leave work. Seely came to him and told him to get a broom and start sweeping in another area. Smith said there were no brooms available and he and Seely got into a heated argument. Smith told Seely there were no brooms available, that he had already cleaned his own area, and that he did not feel like he was a janitor. Seely told him to find a broom and sweep. Smith was then told to report to the office trailer on the job, where he was given a written warning for "Disobedient conduct by refusing to conduct clean up during working hours as directed by appointed supervisor; to wit, when told by R. Seely to help clean up beneath high bay area, employee Smith stated, 'I didn't make that mess. I ain't fucking cleaning it,' or words to that effect." Signed R. Seely, expediter.

Smith denies using profanity. Bishop overheard the argument and corroborates Smith's testimony both with respect to not using profanity as well as there were no brooms available. This warning is alleged in complaint paragraph 2(e) to constitute a violation of the Act. Under circumstances where a supervisor was not shown to be harassing employees, and looking for rules violations by employees, I would be inclined to not find any violation in a warning given in similar circumstances. However, here, the warning itself was given though Smith could not do what he was asked because no broom was available, and the warning untruthfully alleges profanity was used. Given Seely's true mission at the Essex jobsite, the untruthfulness of the warning, Seely's actions with respect to Smith's union insignia, and the fact that Seely branded Smith a "troublemaker" to Lafleur on Smith's first day at Essex, I find that the warning was given to further Respondent's unlawful intent to harass the union supporters and for no legitimate reason. Accordingly, I find that the giving of the warning constitutes a violation of Section 8(a)(1) and (3) of the Act.[22]

Bill Bishop was hired by Respondent at the same time as Smith and was hired to work as a journeyman electrician and run electrical jobs. Bishop is a very experienced electrician and has been a supervisor at other electrical contractors. Like Smith, he contacted Butler shortly after being hired and signed an authorization card and his name appeared on the list of organizing committee members sent to Respondent on January 4, 1993. He was not given any written rules at the time of his hiring. His

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[22] This violation of the Act is alleged in complaint par. 2(e).

employment ended when he was laid off at the Essex job in April 1993. His first assignment with Respondent was running a project at a hospital in Logansport, IN. He began this project, but it was not yet at a stage to need a great deal of electrical work. He was next assigned to another hospital job in Logansport and worked there 3 or 4 days. He was then transferred to the White Rogers project in Logansport. He ran the installation of lighting at this project and was then transferred in December 1992 to the Essex project. At the time he arrived, there were three other electricians on the job supervised by Joel Lafleur. After a few days, he was transferred to the TRW job, and when that job shut down for 2 weeks, was transferred along with Smith and Serna to a job in Rochester, IN, with Smith running the job. They then returned to the TRW job and then he was transferred to a power generating job in Logansport as a journeyman. He was then transferred back to the Essex job and was laid off on April 9 or 10, 1993.

When Bishop was transferred to the Essex job for the second time, Seely was there in what Bishop called a "bird dog" position. He compared him to a first sergeant in the military. Bishop, as were the other electricians, was required to turn in in writing the amount of work he did each day. Bishop had never before worked on a job where quotas were required and where production was recorded on a daily basis. Bishop noted that Seely monitored each break and the lunch period, timing the employees breaks. He observed Seely following Serna to the restroom and telling her she went to the restroom too often.

Electrician Mike Boatman Sr. was employed by Respondent from June 1986 until he went on strike on April 12, 1993. He was used primarily as a foreman by Respondent. He was contacted by Butler in August 1992 and joined the Union and began aiding in the organization effort. His name was on the list of organizing committee members sent to Respondent in January 1993. In mid-January 1993, he was working as foreman on a job in Lafayette, IN. He was then transferred to the Essex job. After 2 or 3 days, he was transferred to the TRW job, then after 2 days there was transferred to the Logansport power generating job. In mid-March he was again transferred to the Essex job.

Boatman was told by Williams that Seely was the foreman on the job, with responsibilities to oversee the job and make sure it kept going. In all his years with Dilling, he had never worked on a job with two foremen as was the case at Essex. He described Seely's activity as "He'd just stand around and watch us, make sure we didn't talk among ourselves, make sure we only took exactly a ten minute break or a 30 minute lunch . . . was right there first thing in the morning to make sure we got started on time, and didn't leave the job too early." Seely did not talk with Boatman, but Boatman overheard some conversations he had with other employees. He heard him tell Gene Kaufman that if he did not take the timesheets into Dilling's office, that nobody else would get their travel pay. This was not one of Kaufman's duties and required him to drive to Logansport. It was one of Seely's duties as foreman.

Seely gave Boatman and his son a write up for leaving 2 hours early one day to go on a vacation. Boatman

had informed Seely of their intentions in this regard, but he said if they did not work the full day, he would write them up and did. According to Boatman, he had already cleared the trip with Williams and Click. Williams did not testify and Click did not deny this testimony. Boatman testified that this represented a change in past practice, when employees were allowed to leave early with advance notice.

He was also told by Seely that he would have to remove an IBEW sticker from his hard hat or he would have to wear a Dilling-issued hard hat, without stickers. Boatman had worn his own hat off and on during his entire 7-year employment with Respondent without comment from management. It was only when he affixed a union sticker did his hat become an issue. He noted that Bishop and Smith were told the same thing and the three were issued new hats. Boatman testified that they were allowed to wear union T-shirts.

Jeff Guinn was transferred to the Essex job in approximately January 1993. He engaged in the informational picketing at the job until his layoff. He testified Seely instructed him to be quiet and not talk on the job, a departure in company practice from Guinn's experience on other jobs for Respondent. Guinn's layoff was also a departure from his past experience as he had always been transferred to another job when work slowed on the one he was working. Although he was laid off, Guinn joined the picketers when the strike commenced.

Eugene Kaufman worked for Respondent from July 1990 until April 12, 1993, when he went on strike at the Essex job. He began his employment as an electrician

apprentice. He worked both on the mechanical and electrical sides of the business. He was transferred to the Essex site from the Morton jobsite in March 1993. He engaged in the strike which began on April 12. He testified that from his perspective, Seely's job was to keep the employees busy and would walk around making sure the employees had plenty to do. On two occasions Seely instructed Kaufman to take some timesheet paperwork to the office in Logansport. As this was not part of his regular duties and as it was required to be done on his own time, Kaufman protested. Seely told him in response that the employees would not get paid unless he took the timesheets to Logansport. Kaufman testified that on other jobs, this was a duty of the foreman.

Donna Serna worked for Respondent from November 1992 until she went on strike in April 1993. She was a journeyman electrician. At the time she was hired, she was not given any written rules. She first worked on the TRW job under the supervision of Lanis Smith. While working on this job, she was complimented on her work by Click. At about Christmas, she was transferred to a job in Rochester, IN, and then came back to TRW on January 4. On January 18, she was transferred to the Essex job. On January 21, she went back to TRW and on February 9, transferred back to Essex.

On her first assignment at the Essex site, Seely was not there and breaks were like they had been at TRW, usually 10 minutes but occasionally exceeding that time limit. On the second assignment, she was told by Williams that Seely was the expediter and was there to make the employees more efficient. It was explained that Lafleur was there as technical support from then on and

Seely would be running the job. The employees were to address him as Mister and show him respect. Serna testified that the employees called him the "enforcer" or "bird dog." By this she testified "that's what he was doing. He was trailing us. He was pointing us, checking out work, and that was his purpose in being there, to bird dog us. He didn't have the technical knowledge to do a foreman's job." She described his duties thusly, "he walked around a lot and watched us. If we need something, it was his job to run and get it at the hardware store or whatever. We tried to keep him running, but he was there to – just watch us, basically, in a supervisory capacity. Sometimes he'd sit on the gang box for 2 or 3 hours at a time. He favorite place to go, he told me, was up on the third floor mezzanine where he could see the whole plant and people couldn't see him." When employees took a break, he came to the gang box and would monitor the breaks. He attempted to write-up Serna on one occasion when she went to the bathroom. On this occasion, it was cold and she went to her car to get extra clothing. She stopped at the restroom on the way back to put on the clothes and when she walked to the gang box, she was confronted by Seely who said she was 4 minutes late coming back from break. She explained what she had done and he said he was going to write her up over it. Serna testified that Williams later told him not to do it.

Seely, though not talking to many of the employees on the job, did talk to Serna. He told her that Hicks and the Culpeppers were "a waste of breath" and "lazy, no good sons-of-bitches." He said their work was inadequate. According to Serna, He told me one day that he didn't even know how to bend pipe and he could put up

as much pipe as J.E. did. He told me they didn't get enough done. Made a comment one day about the quality of union work, knowing that they were union craftsmen. He'd get on their case about going to the bathroom or, if they were standing – Look, our job consists a lot of times of stepping back and looking at what you've got to do. It is work. If you're laying out a run of pipe, you're looking at a situation where you're going to have to – you want to know ahead of time what you're going to do and have a plan of action. He didn't expect any of that inspection type time at all. He wanted them busy. One day we were getting ready to leave and it was about 2 minutes before we were supposed to walk out of the plant and we were all standing at the gang box and he got on J.E.'s case, told him to pick up a broom and sweep. Serna testified that Seely told her he was glad that J.E. Culpepper quit, and commented that he (Seely) was doing a good job. Serna also testified that Seely told her that he wanted to get rid of J.E. Culpepper and Hicks.

Serna testified that Seely also commented about the Boatmans. Seely said they had a bad attitude. He attacked the work and mental state of Jeff Guinn. He said he expected to "get into it" with Lanis Smith. He said Albert Cadwallader did not take his work seriously enough.

Serna asserts that Seely tormented the employees. He followed her to the bathroom several times. She objected to being inspected while working by someone who knows nothing about the job. She objected to his aggressive manner. She objected to him making derogatory comments about coworkers. She also seriously objected to sexual nature of Seely's harassment of her personally. She testified no one else on the job harassed her. Asked to

give an example of such harassment, she cited one occasion when all the electricians were gathered at the gang box before work was to start. Seely commented that "He would love to eat my pussy, but that would put Bob on his forehead and he couldn't take both of us at one time." J.E. Culpepper recalled a similar sexual comment toward Serna at a different time, in front of the other employees. Serna recalled another instance where he asked her what she did the night before, who she was with. He also asked her if she knew what she was doing in relation to her work.

Seely also talked about the employees with Lafleur. He commented to Lafleur that he thought Serna and Guinn did a good job, but that when they finished an assignment, they would just sit and do nothing until given another assignment. He commented that "that must be some of that union bullshit."

Seely commented about Bishop, saying "I don't care if he's had a heart attack or not, . . . if he doesn't get the quota, you know I'm going to nail him."[23] Seely told Lafleur that he considered Smith and Boatman Sr. to be troublemakers.

At one point, Seely asked Lafleur if he needed more men and Lafleur said he could use about four more. Seely said, "Well, we'll be getting some, some men from the precipitator job. But he said they wouldn't be ace hands, they would be trouble makers. He said, 'Some of your

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[23] Bishop at the time was recovering from chemo-therapy treatments.

union brothers.' " Seely added that the Essex job was to be a "weeding out process" for these employees.

I find that, as alleged in complaint paragraph 2(c), Respondent violated Section 8(a)(1) and (3) of the Act by assigning Seely to the Essex jobsite with the clear purpose of surveilling the activities of the employees, harassing the employees, abusing the employees, and discouraging the employees from further employment with Respondent, because the employees supported the union and for no other legitimate reason. He was shown to have given at least one unlawful warning to an employee, and I believe the evidence would support a finding that he gave another such unlawful warning to Mike Boatman Sr. and Jr. He closely observed the work of the employees even though his lack of electrical experience precluded him from appreciating what he was watching, or being able to offer assistance. He denigrated employees in conversations with other employees and clearly engaged in verbal sexual abuse of Serna. He rigidly enforced company rules contrary to past company practice. In his conversations with Lafleur, which are undenied in this record, and in his report to Dick Dilling (G.C.Exh. 13), he clearly showed that his purpose on the job was harass and "weed out" the union supporters. Such a purpose is unlawful under the Act.

2. Respondent violated the Act by photographing the informational picketers. (complaint paragraph 1(h))

For an undefined period of time in February and March 1993, before the strike on the Essex job, the union

supporters engaged in informational picketing at the front gate of the Essex plant. This picketing would take place before and after work and at lunch. The signs stated: "Dilling Mechanical Electrical doesn't provide health benefits for his employees."

The employees engaged in such picketing about 100 feet from the jobsite on public property. The picketing was not massed, and there was no allegation that there was picket line misconduct of any sort. Seely and another management employee, Tad Wilkinson, took pictures of the picketers at Dick Dilling's instruction, allegedly to learn what the picket signs said. The number of times they took pictures is in dispute. It varies from once to regularly in the testimony of the witnesses in this case. It is admitted that Wilkinson and Seely took pictures on the picket line on one occasion each. I believe the confusion in the minds of the witnesses is understandable considering that Seely also took pictures of picketers when a strike commenced in April. Over a period of time, the distinction between incidences of photographing on one occasion versus another can easily become blurred.

I believe the best evidence indicates that photographs were taken more than once, but certainly not regularly. There was no verbal harassment of the pickets by Seely or Wilkinson during the photographing of the pickets. In similar situations, the Board has found such taking of pictures of picketers to be in violation of Section 8(a)(1) of the Act. In *Waco, Inc.*, 273 NLRB 746 (1984), the employer had on one occasion taken an unspecified number of photos of picketers asserting it wanted "to find out what was on the signs and take pictures of them." The Board found such activity unlawful, stating at 747:

"It has long been held that '[i]n the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate.' Photographing lawful, peaceful picketing tends to implant fear of future reprisals. In the particular circumstances of this case, we are convinced that the Respondent's conduct reasonably tended to restrain the employees from engaging in what was undisputedly protected concerted activity. The Respondent had no reasonable basis for anticipating picket line misconduct, since, on the day of the lunchroom protester's discharge and at all times during this picketing, the employees were orderly and peaceful. (Citations omitted.) See also *F.W. Woolworth Co.*, 310 NLRB 1197 (1993). Based on the Board's holdings in the cases cited, I find that Respondent violated the Act by photographing the informational picketers. It asserts as did the employer in Waco, Inc. that it wanted to know what was on the signs. Dilling asserted that he believed the message may have in some manner been unlawful. However, he could have learned the signs' message in other ways and if, after consulting with his attorney, decided to file unfair labor practice charges, then proceeded to document the alleged unlawful message. No such action was taken.

It is not disputed that Respondent took photos of the pickets who engaged in a strike commencing April 12, 1993. For the same reasons I found taking photos of the informational pickets to be unlawful, I find that taking pictures of the strikers was also unlawful. Just as with the information pickets, there was no hint of any picket line misconduct during the strike.

3. Did Respondent constructively discharge its employees, David Hicks, J.E. Culpepper, and John Culpepper? (complaint paragraph 2(c))

Hicks and the brothers Culpepper, three of the original employees on the Essex jobsite quit their employment during February and March 1993, allegedly because of adverse treatment afforded them by Respondent because of their union support and activities. To demonstrate that an employee has been constructively discharged, the General Counsel must show that burdens imposed upon the employee must cause, and be intended to cause a change in working conditions so difficult as to force him to resign and those burdens were imposed because of union activity." [sic] *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976); *Algreco Sportwear Co.*, 271 NLRB 499, 500 (1984). With this test in mind, the evidence relating to the three employees who quit will be discussed. In each case, I believe it is clear that the burden imposed on these employees was the same as on the other employees at Essex, that is, Roger Seely. It is also true in my opinion that Respondent wanted to get rid of the union supporters and Seely was placed at the jobsite to further that end. Both Hicks and the Culpeppers, as well as all other employees on the job were known union supporters. Thus, in the end, the question is whether the actions of Seely with respect to Hicks and the Culpeppers were so difficult and unpleasant so as to force them to resign.

John Culpepper testified that the three responded to a newspaper ad placed by Respondent at the urging of Butler. Seely reported to the job on February 8, 1993, and John Culpepper quit on the morning of February 9, 1993, and shortly thereafter went to work at a job making more

money than he had at Respondent. In support of the contention that he was constructively discharged, he noted that Seely watched the employees. According to John Culpepper, Seely never said anything to him. Culpepper said he noted to Lafleur that Seely was distracting his work. Lafleur did not remember this conversation. John Culpepper did not stay around long enough to be subject to the daily production reports. He never received a writeup from Seely. Rather incredibly, Culpepper testified that he engaged in the informational picketing and that Seely observed him doing so every day. As noted, Seely was only at the site 1 day before Culpepper quit.

Respondent demonstrated that Culpepper was written up by Lafleur on February 2, 1993, for excessive telephone usage. Lafleur was also a member of the union and was involved in the organizing campaign and was clearly not trying to get rid of union supporters. I find that Culpepper quit his employment with Dilling to take a better job and for no other reason. Regardless of what Seely may have done with respect to the other employees on the job, he did not have time to do anything with respect to Culpepper and I did not find Culpepper's statements to the contrary to be believable. I will dismiss the portion of the complaint alleging that John Culpepper wasconstructively discharged and find to the contrary he voluntarily quit.

On the other hand, I do not question that Seely was pleased by the resignation and would have encouraged John Culpepper to quit if given the opportunity. In this regard, the record reflects that after Culpepper left, Seely called Dick Dilling and told him, "We are one Culpepper shor of a full load."

David Hicks was hired in December 1992 and continued until he quit in February 1993. Hicks is an experienced journeyman electrician and was a member of an IBEW local in Charleston, SC. He has traveled extensively and has worked all over the country. He applied for work at Dilling together with John Culpepper. They too are experienced journeymen and have travelled extensively. Hicks and Culpepper were hired by Williams for the Essex job. According to Hicks, Williams also said that if they worked out, there was the possibility of further work. John Culpepper's brother, J.E. Culpepper, was hired for the Essex job shortly thereafter. J.E. was hired by Click. J.E. had been a journeyman since 1971. Click said he would be working at the Essex jobsite. He contends that Click said there would be more work after the Essex job ended.

The three electricians began work at the Essex site in November of 1992, under the direction of Joel Lafleur. Hicks said that Lafleur frequently commented that they were doing a good job. After he began work, Williams and Click would periodically come to the jobsite and inspect the work being done. According to Hicks and the Culpeppers, they said the employees were doing a good job.

On January 4, 1993, Hicks and the Culpeppers signed an authorization card for the involved Local Union and their names appeared on the list of union organizers sent to Dilling the same date. According to Hicks, shortly thereafter, Williams held a meeting with Lafleur, himself and the Culpeppers, telling them that from that time on company rules would be strictly enforced. According to John Culpepper, Williams also indicated that there would

be no more jobs after the Essex job, mentioning the letter to Dilling sent January 4. On cross, John Culpepper amended his testimony to say that Williams said, "All bets are off." According to John Culpepper, Lafleur told him at a later date that this statement meant that there would be no employment past Essex. According to J.E. Culpepper, Williams said that things were fixing to change. The employees would have a new set of rules and would have to meet quotas set according to NECA guidelines. J.E. Culpepper contends that Williams gave the organizing campaign as the reason for the changes.

About 2 weeks after the meeting with Williams, Seely came to the job. He was introduced to Hicks and the Culpeppers by Lafleur, who said he was an enforcer from the Company to make sure their rules and regulations were carried out. Seely then said enforcer was a little too harsh and that he did not want to come off that harsh. Hicks said he did not need an enforcer and he knew how to do his job. Thereafter, Seely watched the work of the employees, observing Hicks from about 50 feet away. He also observed and timed the breaks. He rarely spoke to Hicks, except on one occasion to comment that Hicks' production was not satisfactory.

Hicks quit his employment with Dilling about 2 weeks after Seely arrived. According to Hicks, he quit because he was not used to someone looking over his shoulder at his work and he just could not take it. He testified that he did not like Seely and Seely did not like him. He quit without telling anyone. He left on a Friday and did not go to work on Monday. He said he mentioned to Lafleur that he did not like Seely watching his work

and was told that there was nothing Lafleur could do about it.

I cannot find that Seely's actions toward Hicks for a 2 week period as specifically described in this record can be said to be so difficult and unpleasant as to force him to quit. Though for reasons set out above, I believe Seely's actions constitute an unfair labor practice, quitting in protest over unfair labor practices does not amount to a constructive discharge. Further, though Hicks is mentioned in the evidence as a target of Seely's displeasure, he does not appear to be the prime target for Seely's harassment and his working conditions were thus better than several other employees on the job. As was the case with John Culpepper, there is little specific evidence of any special harassment by Seely regarding Hicks. Again, the evidence reflects that Seely wanted Hicks to go and was pleased when he left. Yet, a clear intention by Seely to force Hicks out is not sufficient in my opinion to find a constructive discharge. The must be some specific examples of harassment or abuse to back up Hick's contention that he could not continue working under Seely. I believe this showing is even more necessary when, as here, other employees endured the general harassment of Seely without quitting. I would dismiss the constructive discharge allegation relating to Hicks.

The situation with J.E. Culpepper is somewhat different. He continued working at the Essex site until March 1993, and appears from the evidence to be the employee Seely most wanted to get rid of. Culpepper said that Seely would occasionally be nice and then would be rude. Culpepper testified he asked why Seely was being so hard, and got the reply, "All's fair in love and war." He

testified that Seely would come and sit about 5 feet away from him and watch him work for hours. Culpepper testified that Seely occasionally made derogatory remarks about him and Robert Guinn, who were staying together in a motel near the jobsite, implying they had a homosexual relationship. Such remarks would be made in front of other employees.

J.E. Culpepper said he was enjoying his work at Dilling until Seely showed up. However, thereafter, he felt threatened by Seely and some of his actions. He explained that on one occasion that Seely wanted to physically harm him. He testified that it got to the point that he did not trust Seely, so he did not go back to work. He did not inform anyone at the job he was quitting. Seely later called him and asked why he did not return to work. J.E. believes he told Seely he quit. On several occasions, however, Culpepper told Lafleur that he was considering quitting because he could not take Seely any more and did not want to endure it.

Lafleur testified that Seely had confrontations with Hicks and J.E. Culpepper, but he was not aware of the details surrounding the confrontations. He remembered one occasion when Seely returned to the office angry and said he was going to nail the two for non-production. He added that they were going to the bathroom too often and were dragging their feet. Lafleur also recalled that Seely told him once that "He had J.E. screwed so tight he [sic] about to blow up," and added he thought Culpepper would quit. In the same conversation Seely said, "He was breathing down his neck and getting in his shit," and that Culpepper didn't like it. He also remembered a phone conversation between Seely and Williams wherein Seely

told Williams that he thought J.E. Culpepper and Hicks would quit before the end of the week.

From the evidence adduced, it appears to me that Seely did specifically target Culpepper and was actively trying to get him to quit. Having heard Culpepper testify, I believe that he did quit because he could not take Seely's harassment any longer. I therefore find that J.E. Culpepper was constructively discharged by Respondent because of his union support. [24]

4. Did Respondent unlawfully layoff employees at the Essex jobsite? (complaint paragraph 2(f))

On April 8, 1993, Respondent laid off employees Lanny Smith, Bill Bishop, Jeff Guinn, and Albert Cadwallader. Under *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), in order to find an action, such as the layoff here involved, to be unlawfully motivated, the General Counsel has the burden of proving (1) the discriminatees' union or protected activity; (2) the employer's knowledge of this activity; and (3) the

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[24] Though the evidence is conflicting, I do not think that Culpepper was hired as a permanent employee by Respondent, and on the contrary, believe he was hired only for the Essex job. Lafleur testified that the purpose of hiring the three new employees was for that job. No other employees testifying other than Hicks and the Culpeppers indicated that they were told at the time of hiring that they were being hired for a specific job. Had Culpepper not quit, it is likely that he would have been laid off in early April, as he did not have as great seniority as Bishop, at least.

employer's animus or hostility toward the discriminatees' union activity. Clearly the General Counsel has established all three of these elements. Each of the employees laid off were union supporters, and their support was known by Respondent. The record herein is replete with evidence of Respondent's animus toward the Union. Thus, under *Wright Line*, the burden shifts to Respondent to show it would have taken the same action even in the absence of union activity.

The past practice of Respondent prior to the Essex layoff was to transfer employees from a job that was ending to another job. Each of the employees laid off had experienced such transfers. Bishop and Smith had both supervised jobs for Respondent without problem. Cadwallader and Guinn were the stepson and son of Bishop and Robert Guinn respectively, and though not very experienced in the electrical field, had been used from job to job, and when work was not available for them on a job, in the Respondent's shop.

Robert Guinn testified that the usual practice at Respondent regarding layoffs is that Respondent had a core group of employees who would move to another job when a job was finished. Extra employees would be hired on a job-by-job basis and these extra employees were the only ones laid off. Guinn identified as core employees those like himself who were capable of supervising a job. None of the employees laid off were called core employees by Guinn. The layoff was by seniority, at least as far as the Essex employee complement was concerned. When asked why he laid off the employees at the Essex site, Dick Dilling stated: "We were wrapping up our work

(on the Essex job), we didn't have anything for several weeks on the jobsite."

Respondent told these employees at the time of their layoff that it was an economic reduction in force, and though no detailed evidence was introduced at the hearing to substantiate this assertion, it is supported by the General Counsel's Exhibit 23.[25] This exhibit reflects jobs in progress on various dates between April 1, 1993, and May 30, 1993. According to the exhibit, Respondent had 15 jobs in progress on April 1, 11 jobs in progress on April 30, and only 8 jobs in progress on May 30. It also reflects that at about the same time as the instant layoff, seven other electrical employees were laid off. None of these employees was shown to be a union supporter. Additionally, other than employees subcontracted to finish the Essex job, no other electrical employees were hired from the date of the layoff to May 30. Based on this exhibit, I believe that Respondent has satisfied its burden of proving that the layoffs would have occurred even in the absence of protected activity by the affected employees.

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[25] At the hearing, Dick Dilling indicated that Jeff Guinn's layoff was prompted by lack of work and poor performance. In light of my finding that the layoff was lawful, it is unnecessary to examine in detail the assertions about Guinn's performance. I agree, however, with General Counsel that the number of write-ups Guinn received on the job seem to be the result of Seely's rigid enforcement of all company rules rather than a change in Guinn's work habits.

Through at least the end of May 1993, none of the 11 employees laid off in April had been recalled by Respondent. The four involved employees have never been recalled and there is no evidence concerning whether any of the other seven laid-off employees have been recalled.

5. Was the Strike Which Commenced on April 12, 1993, an Unfair Labor Practice Strike? (Complaint paragraph 3(a))

The employees remaining on the Essex job went on strike on April 12, 1993. According to Guinn, the union supporters on the Essex job met at the union hall the night before the strike and complained of the treatment of them by Seely. They decided to go on strike to protest what they considered unfair labor practices committed by him. Layoffs had started on the job and these employees believed that if they were going to strike, it would have to be soon or the job would be finished. Donna Serna testified that the employees went on strike because morale was very low. She testified that Seely was getting worse, and harassment was getting worse. A few of the supporters had been laid off and the remaining supporters felt that if they did not strike soon, there would be no one left. Mike Boatman Sr. went on strike because of Respondent's use of Seely, who he characterized as an enforcer, and because of changes in the company's policies.

Union Representative Ed Butler testified that the employees went on strike because of the conditions on the job with Seely and the fact that they felt they had been sent to the job like a death ship, and would go down

with the job. Specifically the employees objected to the change in work rules, the surveillance by Seely, and the harassment by Seely. The employees also felt that the layoffs that had occurred the previous week were motivated by animus rather than by economic reasons because the persons laid off were all members of the organizing committee.

The strike began at noon on April 12, 1993. Guinn testified that he told Seely the employees were striking over unfair labor practices committed by him and the Company. The signs used on strike stated: "Unfair labor practice strike against Dilling Mechanical Electrical." Seely returned to the office and asked Lafleur if he knew anything about the strike.[26] Lafleur said he did not and Seely said he was going to call the main office. He later reported to Lafleur that Dick Dilling told him that as far as the Company was concerned, the strikers had quit, and if they try to come back, they would not be allowed on the jobsite. The following day, the strikers were replaced by workers borrowed from another contractor. Lafleur went on strike 2 days later and joined the picket line.

I have heretofore found that Respondent violated the Act by placing Seely on the Essex job to harass and get

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[26] The transcript states that Guinn was the person doing this. This is obviously an error by the reporter. It would have been either Seely or Click, both of whom were present when the strike started. Each testified that Guinn told them that the employees were going on strike. Seely testified that after the strike began, he returned to the office and called Dilling. On cross, Lafleur indicated that it was Click who made the call. Neither Dilling nor Seely denied the truthfulness of Lafleur's testimony about the message from Dilling and I accept it as fact.

rid of the employees on this job because of their union support. I have also found that Respondent violated the Act by the actions taken by Seely in harassing and abusing the employees because of their union support. I therefore find that a strike called to protest these unfair labor practices is in fact an unfair labor practice strike and the strikers were unfair labor practice strikers. *Chesapeake Plywood, Inc.*, 294 NLRB 201 (1989); *Northern Wire Corporation*, 291 NLRB 727 (1988).

6. Was Respondent's Response to an Unconditional Offer to Return to Work Sufficient to Toll a Backpay Obligation? (Complaint paragraphs 3(c) and (d))

After about a week of picketing, the striking employees met at the union hall and decided to offer to return to work. The next day, on April 19, Guinn, Serna, and Kaufman drove to the Essex jobsite, with the Boatmans following in another vehicle. Guinn first encountered Seely, who Guinn asked to summon Glen Click. Click had taken over supervision of the job after Lafleur joined the strike. Click came out and Guinn told him the employees were ready to return to work. According to Guinn, Click said that he had to get the job done, and had replaced the strikers. Click advised Guinn if he had any more questions, to contact Dick Dilling and set up an interview. Gene Kaufman, who was present for the conversation, testified that Guinn asked Click if they were allowed to return to work and Click said that they needed to talk to Dick Dilling, because as far as the Company was concerned, they had quit and they had replaced them. Donna Serna overheard the conversation and said

that Guinn told Click that the strikers were ready to go back to work pursuant to the fax that had been sent, and Click said they had been replaced. Click also said that when they went on strike, they had quit. She testified that they were told to call Dick Dilling.

With respect to the conversation about returning to work, Click testified Guinn said he was ready to go back to work. According to Click, he said, "Bob, I had to bring more people down there. You'll have to call Dick Dilling for an assignment." Seely testified Click told the returning strikers to call Dilling. According to Seely, he did not say why, saying "I can't answer that question, you need to take it up with him."

I credit the version of the conversation given by Serna and Kaufman for two reasons. One, Serna demonstrated that she had an accurate memory at the hearing, and her version and that given by Kaufman comport with the other facts of record. As noted above, Lafleur credibly testified that Dick Dilling considered the strikers as having quit their job when the strike commenced and dictated they would not be allowed back on the job. Though four electrical workers had been supplied by a subcontractor to the work in place of the strikers, General Counsel's Exhibit 23 reflects that Respondent's own employees Gary Byers, Mark Freo, Leonard Hopper, Dave Maggert, Jim Meyers, and Mike Starnes were transferred at least part time to the Essex job. Each of these employees worked both at Essex as well as at another jobsite and all were working substantial overtime. If Respondent had any intention of allowing the strikers to return to work, it would have been simple to allow them

to do so and simply return the employees named above to their regular jobs and eliminate the overtime.

However, it is clear to me that Respondent had no intention of allowing the employees to return. In addition to Lafleur's testimony about the strikers' true status, Respondent's employment records for Guinn, Serna, Boatman Sr., and Boatman Jr., all reflect "employee quit" on April 12 or 13, 1993. Without a shred of credibility, Dick Dilling, Roger Seely, and Glen Click all disclaimed any knowledge as to who authorized that entry on these employees personnel records, speculating it might have be done by an office secretary.

Also, on April 20, the employees faxed a letter making an unconditional offer to return to work to Respondent, which received the fax about 8:15 a.m. on April 20. This letter, signed by Guinn, Boatman Sr. and Jr., Serna, and Kaufman was sent to Dilling on union stationery and reads:

> This letter is to notify you that as of 7:00 A.M., 20 April 1993 the Organizing Committee has unconditionally called off their Unfair Labor Practice Strike against Dilling Mech./Elec. Contractors and returned to work. They have reported to the Essex Wire jobsite of which they were last assigned and are ready to go back to work.
>
> If you have any questions, please contact Ed Butler with I.B.E.W. Local 668 at 317-474-1021.

Other than the response given to Guinn, Kaufman, and Serna by Click, Respondent made no other response to either the physical offer to return or the faxed letter. None of the strikers contacted Dick Dilling. The picketing

resumed after the strikers were not allowed to return to work at the Essex jobsite on the morning of April 20. It continued for about a month at the Essex site, and in addition, in front of the Logansport headquarters of Respondent. Though Respondent's management observed the picketing, nothing was said to the strikers about returning to work.

On July 27, 1993, another letter was sent by the above-named strikers to Dilling stating:

> We are aware of the fact that you are attempting to hire employees through the services of Manpower Temporary Services, Kokomo and Flexible Personnel, Peru.
>
> We wish to remind you that the following employees of Dilling Mechanical/Electrical did issue you an unconditional return to work, following their strike and still wish to return to work for your company.

Respondent, by its attorney, responded to this letter on August 4, 1993. This letter states, inter alia:

> It is unclear from the text of your letter whether or not you are acting on behalf of the individuals named in your letter. There is nothing in your letter that indicates that you are authorized to act on their behalf. Furthermore, the second paragraph of your letter states in part that "the following employees of Dilling Mechanical/Electrical did issue you an unconditional offer to return to work for your company." However, there is no record of such an action by these employees. Consequently, if you possess relevant documents which substantiate your statements, please forward them to me.

> Finally, please confirm the current employment status of these six individuals, including wage rates, and job functions. All of these individuals have recently refused an opportunity to work with Dilling. Therefore, the representations in your letter require further clarification." [sic]

On April 20, 1994, another letter was sent, this time with the signatures of the strikers named in the first letter and additionally by Jeff Guinn, Lanis Smith, Bill Bishop, and Albert Cadwallader, which stated:

> This letter is to restate and to remind you that on April 20, 1993 and several occasions since then, the organizing committee of IBEW Local 668 made an unconditional offer to return to work on behalf of the Unfair Labor Practice Strikers.
>
> As we have stated before, the ULP Strikers are willing to discontinue their strike and return to work. If you do not have a means to contact any of the strikers, you can get in touch with them by calling Ed Butler at 317-474-1021, Monday thru Friday from 8: a.m. until 5:00 p.m. If you have any questions regarding this matter, please don't hesitate to contact Ed Butler.

The letter of August 4, 1993, by Respondent counsel is the only response to the offers to return to work since the April 20, 1993, response by Click to Guinn.

I find from the evidence that Respondent terminated the employment of the strikers when they commenced their strike based on the statement credibly attributed to Dick Dilling by Lafleur at the strikes inception and by the

strikers personnel records.[27] I find that they were informed that their employment had been terminated when Click told Guinn, Kaufman, and Serna that they had quit their employment and had been replaced. Conditioning possible reemployment on a call to or interview with Dick Dilling was not lawful. As the Board stated in *Chesapeake Plywood*, supra, at 202-203:

"The strike was an unfair labor practice strike from its inception. Consequently, the Respondent was not at liberty to threaten to terminate or terminate any of its striking employees because they failed to respond to-the May 22 letter. As unfair labor practice strikers, they could not lawfully be discharged, or threatened with discharge or other disciplinary action, other than for misconduct causing them to lose the protection of the Act. They were entitled to reinstatement on making an unconditional offer to return to work and their reinstatement rights were paramount over any replacements hired for them during the strike. The Respondent, therefore, could not diminish, circumscribe, or affect their reinstatement rights through preferential hiring lists of the kind it established here or subordinate those rights to the rights of employees hired to replace them. Indeed, the replacements for the strikers should have been discharged, if necessary, to accommodate the reinstatement of the unfair labor practice strikers when they sought reinstatement."

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[27] Dick Dilling testified that he waited all day on April 20, 1993, for a call from the strikers so he could reassign them. I do not believe this testimony and do not credit it.

I find that Respondent had an obligation to reinstate the unfair labor practice strikers to their former jobs when they made what is clearly an unconditional offer to return to work. Telling them they are considered to have quit, have been replaced, and must therefore call Dilling is not sufficient. Respondent had the obligation to inform them that they would be returned to work and do so. Respondent chose to do neither and thus has violated Section 8(a)(1) and (3) of the Act. Its late found argument that it was confused about the strikers' intentions when they returned to the picket line after having been rebuffed by Click is spurious. It did not respond in any fashion to the faxed letter it received on April 20, even to inquire if the offer to return was still valid and was unconditional. Its response to the July 27, 1993 letter reminding Respondent that there was an outstanding offer to return to work is disingenuous, questioning the right of the Union to make such an offer on behalf of the strikers and even denying that such an offer had ever been made. I find that Respondent's actions with regard to various offers by the strikers to return to work are unlawful and amount only to an unlawful termination of their employment.

E. Respondent Violated the Act By Its Actions Taken Against Its Plumbing Employees

1. The Allegations Involving Supervisor Dick Eldridge (Complaint allegation 1(a))

Michael Underhill was employed by Dilling from November 2, 1990, until May 28, 1993. For the first year and a half, he was a plumber foreman. He then gave up

his foreman's job and worked as a plumber. In the summer of 1992, he learned from Mike Boatman and Bob Guinn that the electricians were trying to organize Dilling. In September, he was asked by Tom Pantera, an organizer for the Plumbers Union, to assist in organizing the plumbers working for Dilling. Underhill agreed to help and gave Pantera the names and addresses of Respondent's plumbers and pipefitters. Following this, he spoke with a number of these employees about the Union. At the time, and until about the time he left Respondent's employ, he worked at a project in Logansport, IN. His supervisor was Dick Eldridge. On or about December 1, 1992, the job was visited by Union Representative Paul Long at lunchtime. Other than Underhill, one unnamed plumber and plumbers Roy Belt, Bobby Johnson, and Bret Johnson were working on the project. Long spoke with them for about 15 or 20 minutes.

On the next day, in Respondent's office trailer on the site, Eldridge spoke to the plumber employees. He asked if a union representative had visited the jobsite and Underhill said he had. According to Underhill, Eldridge said, "Well, I am going to tell you right now, Dick Dilling can't fire anyone for talking union, but I can. And I will." As the meeting broke up, Eldridge asked Underhill if he was a member of a union and Underhill said he was not.

Bobby Johnson testified that Eldridge said that Dick Dilling is not in a position to fire anybody, but I am if there is any union discussion on the job.

Eldridge testified that he told the employees that a union was trying to organize the Company without taking any position on the campaign. He was trying to keep

them from panicking or getting upset. He denies interrogating the employees and denies making any new rules.

I credit the testimony of Underhill and Johnson and find that Eldridge threatened to discharge employees for engaging in union or other protected concerted activities. Eldridge did not deny specifically the threats attributed to him and did not appear credible in any case. A threat to discharge employees for engaging in protected activity clearly tends to restrain, interfere with, and coerce employees in the exercise of their protected rights and is thus violative of Section 8(a)(1) of the Act.

2. The Allegations Involving Supervisor Jerry Bunn. (Complaint allegations 1(j)(i)(ii))

Michael Underhill moved to another jobsite, the Weaver Popcorn job, in about May 1993, where he was supervised by Jerry Bunn. Underhill had been on the job for a few days, when he was asked to come to the Company's office trailer on site. Bunn told him that he and Mike Boatman were jeopardizing his future with Dick Dilling by trying to organize the union. Underhill asked how Bunn found out that he had been talking union. Bunn said one of his employees told him. Underhill asked which one and Bunn refused to tell him, adding that Underhill was not to talk union on his job. On cross-examination, Underhill denied that Bunn told him he had had complaints from an employee to the effect that Underhill was harassing him about the union and union organizing. Bunn did testify that Bunn told

him that he was not to pursue employees who had expressed a desire not want to talk union shop with him.

Respondent chose not to call Bunn to testify, and thus Underhill's testimony is unrefuted. Obviously Respondent wants the inference drawn from the foregoing recitation of the evidence with regard to Bunn that Bunn had received a complaint from a fellow employee that he was being harassed by Underhill and that he wanted it to stop. However, in the absence of Bunn's testimony, I cannot make such an inference. Based on the evidence before me, I have a supervisor prefacing his remarks with a veiled threat that the employee is jeopardizing his future by the employee's organizing efforts. I then have evidence that Respondent is aware of the organizing efforts of this employee and another, though Underhill did not wear any union insignia to the job. I have Underhill's testimony that he was then instructed not to talk about the union on the job, and the additional admonition that he was not to talk about the union to employees who did not want to talk about it. I credit Underhill's testimony that he was told not to talk about the union at the job. It is entirely consistent with the admonition Respondent gave to its electrical employees and with that given the plumbing employees by Eldridge. I find that it is unlawful as the Respondent did not have in place a lawful no-solicitation rule and there was no prohibition about talking about any other subject on the job.

I also find as alleged in the complaint that Bunn's statements give the impression that Underhill's protected activities were under surveillance by Respondent, in violation of Section 8(a)(1) of the Act.

3. Allegations Involving Supervisor Ed Queen. (Complaint allegations 1(g)(h)(k)(ii))[28]

Thomas Zent worked as a journeyman plumber for Respondent from May 1994 until August 1994. At about the time he started work at Dilling he was approached by Union Representative Tom Bear and asked to help organize the plumbers. When Zent was hired, he was shown a set of written employee rules. He was assigned to a variety of jobsites, eventually ending at a site called the Donnelly job in Warsaw, Indiana. His supervisor on that job was Ed Queen. For 2 months, Zent kept his union sympathies to himself. However, in August 1994, Zent wore a union hat and T-shirt to work and told Queen he was in the Union. Queen told him that he could not wear the insignia, and then amended that to say that he would have to check to see if it was against company rules. Queen, however, did not get back to Zent with any information about the rules. According to Zent, Queen also told Zent to wear his safety glasses on this day. Zent contends that the wearing of such glasses is required by Respondent's rules, but is not strictly enforced. He contends that on this occasion another plumber was standing nearby without wearing his glasses and was not similarly admonished. Zent also testified that this admonition came after he was fired. I cannot find that this makes any sense and will not find a violation of the Act as alleged in the complaint.

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[28] I can find no evidence in the record to support those complaint allegations with reference to actions taken by Queen denoted as allegations 1(k)(i) and (n)(i)(ii). I therefore recommend dismissal of these allegations.

About a week later, Zent again wore a union T-shirt and Queen observed him and said, "What did I tell you about that shirt." Zent said he was not taking it off. Queen then fired him. Other employees were allowed to wear hats and T-shirts with logos other than Dilling's on them. Later that same day, Queen called Zent and offered him his job back, saying that he could not fire him for wearing the T-shirt. Zent later talked with Dick Dilling's wife about the matter and agreed to return to work.

Zent's testimony is undisputed. I therefore find that he was unlawfully prohibited from wearing union insignia, unlawfully threatened for wearing the insignia and was unlawfully discharged for wearing such insignia in violation of Section 8(a)(1) and (3) of the Act.

Thereafter in the next few days, Zent would wear his T-shirt, which caused comments and what Zent characterized as "riding" from Queen. Additionally, the job superintendent, whose first name is Paul, told him "that he really shouldn't be wearing the shirt and that it wasn't right."[29] Zent responded that he had every right to wear the shirt and that he was not going to take it off. The complaint alleges that this supervisor prohibited Zent from wearing the T-shirt. I disagree. The supervisor clearly did not prohibit Zent from wearing the shirt. However, the negative comment does carry an implied threat, especially in light of Zent's abortive discharge the day before. Accordingly, I find that the comment violates Section 8(a)(1) of the Act.

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[29] No one supplied this man's full name for the record. On the other hand, no one disputed that a person named "Paul" was a supervisor on the involved job.

Later that day, when Zent took a break with other employees, Queen came to get him to return to work, without telling the other employees to do so. Queen escorted him back to his worksite. As they were walking back to Zent's workplace, Queen told him, "If you want to play games, I can play games, too." Again this evidence is undisputed and I find that Respondent, through Queen, discriminatorily restricted Zent's breaktime because of his union activity. This is a violation of Section 8(a)(1) of the Act.

Zent at some point after returning to work from his discharge called Dick Dilling and asked for a raise. Dilling referred him to an area manager for the Company, whom Zent asked for a $3- or $4-an-hour raise. The manager said that was a lot of money and that he could not give him the raise, as he had not worked there long enough. Zent then said he was going on an economic strike and did so. Zent has had no further contact with Respondent.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The involved Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by:

(a) About December 2, 1992, by Dick Eldridge, at the trailer at the Logansport Memorial Hospital jobsite,

threatening employees with discharge if they engaged in union and protected concerted activities.

(b) About January 6, 1993, by oral announcement of Fred Williams, at the TRW jobsite, imposing more onerous and rigorous terms and conditions of employment on its electrical worker employees when it:

(i) instituted more strict enforcement of its rules of conduct and employment rules because its employees engaged in union and protected concerted activities; and

(ii) changed its former break policy to more severely restrict electrical employees' freedom of movement on the jobsite because its employees engaged in union and protected concerted activities.

(c) About January 6, 1993, by oral announcement at the TRW jobsite, promulgating and since then maintaining a rule restricting employees' union activities to their time off and away from Respondent's premises.

(d) About January 8, 1993, by Glen Click at the Morton jobsite, interrogating its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(e) About January 15, 1993, by Glen Click at the Morton jobsite, interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(f) About February 8, 1993, and thereafter in February, March, and April 1993, by Roger Seely, at the

Essex jobsite, subjecting certain of its employees to more strict surveillance of their work product, inclusive of standing over and near employees while they worked, physical intimidation, and verbal abuse because they engaged in union and protected concerted activities.

(g) About February, March, and April 1993, by Roger Seely, at the Essex jobsite, taking photographs of employees involved in picketing, engaged in surveillance of employees engaged in union and protected concerted activities.

(h) About May 31, 1993, by Jerry Bunn, at the Weaver Popcorn jobsite;

(i) instructing employees to cease their union and protected concerted activities; and

(ii) creating an impression among employees that their union and protected concerted activities were under surveillance by Respondent.

(i) About August 3, 1994, by Ed Queen at the R.R. Donnelly jobsite, prohibiting its employees from wearing or otherwise displaying union insignia.

(j) About August 8, 1994, by Ed Queen at the R.R. Donnelly jobsite, threatened to discharge an employee because he wore clothing bearing union insignia.

(k) About August 9, 1994, by Paul (surname unknown), at the R.R. Donnelly jobsite, impliedly threatening an employee with reprisal for wearing or otherwise displaying union insignia.

4. Respondent has violated Section 8(a)(1) and (3) of the Act, by:

(a) About January 11, 1993, issuing verbal reprimands to its employees David Hicks, J.E. Culpepper, and John Culpepper.

(b) About February 8, 1993, imposing more onerous and rigorous terms and conditions of employment on its electrical worker employees at the Essex jobsite, by assigning Roger Seely to oversee their work and handle all personnel matters.

(c) Causing the constructive discharge of J.E. Culpepper on March 3, 1993.

(d) About February 10, 1993, imposing more onerous and rigorous terms and conditions of employment on its electrical worker employees by introducing a production quota system at the Essex jobsite.

(e) About March 16, 1993, issuing a written reprimand to its employee Lanis Smith.

(f) Between August 3 and August 11, 1994, imposing more onerous and rigorous terms and conditions of employment on its employee Thomas J. Zent at the R.R. Donnelly jobsite, by restricting the length of his break periods.

(g) About August 8, 1994, terminating its employee Thomas J. Zent.

5. Since about April 12, 1993, certain employees of Respondent employed at the Essex jobsite ceased work

concertedly and engaged in a strike caused by Respondent's unfair labor practices described above in paragraphs 3(f) and (g) and 4(b) and (c).

6. About April 20, 1993, by letter dated April 19, 1993, sent via facsimile, and by oral announcement, all employees who had engaged in the strike made an unconditional offer to return to work.

7. Respondent has violated Section 8(a)(1) and (3) by:

(a) Since about April 20, 1993, failing and refusing to reinstate the striking employees who made the unconditional offer to return to work to their former positions of employment or to substantially equivalent positions.

(b) About April 20, 1993, by failing to reinstate the involved strikers, causing their termination.

8. The unfair labor practices which Respondent has been found to have committed affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent did not commit the other violations of the Act alleged in the complaint.

The Remedy

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed and refused to reinstate unfair labor practice strikers Robert Guinn, Donna Serna Hoaks, Eugene Kaufman, Michael Boatman Sr., and Michael Boatman Jr., I recommend that it be ordered to offer them immediate reinstatement to their former positions or to substantially equivalent positions, discharging if necessary any employees hired to replace them, and to make them whole for any loss of wages or benefits they may have suffered by Respondent's discriminatory actions toward them. Backpay shall run from April 20, 1993, until the date Respondent offers the discriminatees reinstatement to their former positions, and shall be computed in accordance with the Board's policy as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 181 (1987).

Having found that Respondent constructively discharged its employee J.E. Culpepper on March 3, 1993, I recommend that Respondent be ordered to make him whole for any loss of wages or benefits he may have suffered by Respondent's discriminatory action against him. Backpay shall run from March 3, 1993, until the date it is shown that work on the Essex Wire Products job in Franklin, IN, was completed.[30] Backpay and interest shall be computed in the manner set forth above.

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[30] I have heretofore found that Respondent hired this discriminatee for the Essex project only. Therefore, as the job has long since been completed, I am not recommending reinstatement.

Having found that Respondent issued unlawful discipline to Lanis Smith on March 16, 1993, and to J.E. Culpepper, David Hicks, and John Culpepper, on January 11, 1993, I recommend that Respondent be ordered to expunge from its records the warnings given these employees and notify them in writing that it has done so and that such warnings will not be used against them in any way.

Having found that Respondent has promulgated and enforced an unlawful rule restricting employees' rights to talk about unions at the workplace, and has promulgated and enforced an unlawful quota system, I recommend that it be ordered to rescind such unlawful rule and quota system and cease and desist from enforcing same.

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I issue the following recommended:

ORDER[31]

The Respondent, Dilling Mechanical Contractors, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge if they engaged in union and protected concerted activities.

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[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Imposing more onerous and rigorous terms and conditions of employment on its electrical worker employees by instituting more strict enforcement of its rules of conduct and employment rules changing its former break policy to more severely restrict electrical employees' freedom of movement on the jobsite because its employees engaged in union and protected concerted activities.

(c) Promulgating and since then maintaining a rule restricting employees' union activities to their time off and away from Respondent's premises.

(d) Interrogating its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(e) Imposing more onerous and rigorous terms and conditions of employment on its employees by assigning a supervisor to oversee employees' work and handle all personnel matters, subjecting certain of its employees to more strict surveillance of their work product, inclusive of standing over and near employees while they worked, physical intimidation, and verbal abuse because they engaged in union and protected concerted activities.

(f) Taking photographs of employees involved in picketing without any justification for so doing.

(g) Instructing employees to cease their union and protected concerted activities; and creating an

impression among employees that their union and protected concerted activities were under surveillance by Respondent.

(h) Prohibiting its employees from wearing or otherwise displaying union insignia.

(i) Threatening to discharge an employee because he wore clothing bearing union insignia.

(j) Impliedly threatening an employee with reprisal for wearing or otherwise displaying union insignia.

(k) Issuing verbal reprimands to its employees for engaging in union or other protected concerted activities.

(l) Causing the constructive discharge of employees because they engaged in union or other protected concerted activities.

(m) Imposing more onerous and rigorous terms and conditions of employment on its employees by introducing a production quota system, and restricting the length of break periods, because they engaged in union or other protected concerted activities.

(n) Issuing discipline to employees because they engaged in union or other protected concerted activities.

(o) Discharging employees because they wear union insignia at the workplace or engaging in other union or protected concerted activities.

(p) Failing and refusing to reinstate striking employees who made an unconditional offer to return to

work on April 20, 1993, to their former positions of employment or to substantially equivalent positions.

(q) Terminating employees who engage in an unfair labor practice strike.

(r) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Robert Guinn, Donna Serna Hoaks, Eugene Kaufman, Michael Boatman Sr., and Michael Boatman Jr. immediate reinstatement to their former positions or to substantially equivalent positions, discharging if necessary any employees hired to replace them, and make them whole for any loss of wages or benefits they may have suffered by Respondent's discriminatory actions toward them, with interest.

(b) Make J.E. Culpepper whole for any loss of wages or benefits he may have suffered by Respondent's discriminatory action against him in the manner set forth in the "Remedy" section of this decision.

(c) Rescind and remove from their personnel files any evidence of unlawful discipline issued to Lanis Smith on March 16, 1993, and to J.E. Culpepper, David Hicks, and John Culpepper on January 11, 1993, and notify them in writing that it has done so and that such discipline will not be used against them in any way.

(d) Rescind and cease enforcing its unlawful rule restricting employees' rights to talk about unions at the workplace, and its unlawful quota system.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records, and reports and all other records necessary or useful in complying with the terms of this Order.

(f) Post at its facility in Logansport, IN, and at any subsidiary or jobsite office maintained by it, copies of the attached notice marked "Appendix."[32] Copies of this notice on forms provided by the Regional Director for Region 25, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 25 in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply with the terms of this Order.

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[32] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C., May 19, 1995

/s/ Wallace H. Nations
Wallace H. Nations
Administrative Law Judge